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2546  
**No. 12019**

IN THE

# **United States Court of Appeals**

FOR THE NINTH CIRCUIT

---

HARRY C. WESTOVER, United States Collector of  
Internal Revenue, Sixth Collection District of Cali-  
fornia, and UNITED STATES OF AMERICA,

Appellants,

vs.

AGNES F. SMITH,

Appellee.

---

## **TRANSCRIPT OF RECORD**

Upon Appeal From the District Court of the United States  
for the Southern District of California  
Central Division

---

**FILED**

OCT 16 1948

PAUL P. O'BRIEN,  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

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United States Attorney

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For Appellee:

BERT A. LEWIS of

GIBSON, DUNN & CRUTCHER

634 S. Spring Street

Los Angeles 14, Calif. [1\*]

In the District Court of the United States in and for the  
Southern District of California  
Central Division

No. 7476 WM

AGNES F. SMITH,

Plaintiff,

vs.

HARRY C. WESTOVER, United States Collector of  
Internal Revenue, Sixth District of California, and  
UNITED STATES OF AMERICA,

Defendants.

COMPLAINT TO RECOVER OVERPAYMENT OF  
FEDERAL INCOME TAX

FIRST CAUSE OF ACTION

Comes now the Plaintiff, Agnes F. Smith, and for her  
first cause of action herein alleges as follows:

I.

Plaintiff is and has been since May, 1943, a resident of  
Los Angeles County, California.

II.

In 1933, Plaintiff acquired all of the outstanding capital  
stock of The Quickwork Company, an Ohio corporation,  
and continued to own said stock until the liquidation of  
said corporation during 1940.

III.

The Quickwork Company, above mentioned, immedi-  
ately prior to its liquidation and for many years prior  
thereto engaged in the [2] business of the manufacture  
and sale of certain machine tools consisting principally of  
various types of rotary shears. It owned patents and

drawings covering the manufacture of such machines and in addition to the manufacture and sale thereof had licensed other companies to manufacture similar machines on a royalty basis.

#### IV.

Under date of May 31, 1940, The Quickwork Company entered into an agreement for the sale of all of its assets, exclusive of cash in the bank and certain miscellaneous items, to Whiting Corporation, an Illinois corporation. Said agreement provided that the latter corporation should pay as consideration for said property \$15,000 in cash, certain other fixed amounts of a minor nature and 10% of the gross sales price to the Whiting Corporation on all machinery and equipment thereafter developed and manufactured by it as a result of acquiring the machinery, patents and patterns of The Quickwork Company. The obligation to make said payments based on a percentage of sales was to continue in any event until May 31, 1950 and thereafter during the lifetime of Plaintiff Agnes F. Smith who was 57 years old at the date of said agreement. A true and correct copy of said agreement of sale, exclusive of inventory and miscellaneous schedules attached to the original, is attached hereto as Exhibit "A" and is incorporated herein by reference as if fully set forth herein.

#### V.

The contract of sale between The Quickwork Company and the Whiting Corporation was an arms-length transaction in which each party was interested in making the best bargain possible. The Directors and stockholders of the Whiting Corporation were not related or interested in any way in The Quickwork Company nor was The Quickwork Company, its stockholders, or directors inter-

ested or related in any way to the Whiting Corporation. Plaintiff as the controlling officer and stockholder of The Quickwork Company attempted to secure the [3] best bargain possible for that Company and in connection with such negotiations did not solicit nor receive any advice concerning the tax consequences to The Quickwork Company or herself of the various counter proposals made during said negotiations or the agreement as finally executed. For many years prior to said sale the annual sales of The Quickwork Company had been substantial and both parties to said agreement realized that the impending War would be likely to increase considerably the demand for and sales of The Quickwork line.

#### VI.

The agreement contained in said contract of sale by the Whiting Corporation to pay the 10% based upon gross sales had a substantial value and the parties to such agreement realized it had a substantial value, but there was no way of ascertaining the measure of said value at the time of said sale, and said agreement then had no ascertainable fair market value.

#### VII.

Shortly after May 31, 1940 pursuant to the aforesaid agreement The Quickwork Company transferred and delivered by Bill of Sale to the Whiting Corporation complete title to the assets as described in and as required by said agreement of May 31, 1940, and thereupon ceased to have any interest whatsoever in said assets and at no time thereafter has The Quickwork Company or Plaintiff owned or possessed any interest whatsoever with respect to said assets.

#### VIII.

Shortly after the consummation of the aforesaid contract dated May 31, 1940 The Quickwork Company deter-

mined to liquidate and dissolve, and under date of August 24, 1940 it transferred by a Bill of Sale and Assignment all of its assets of whatsoever nature including its rights against the Whiting Corporation under the agreement of May 31, 1940, to the Plaintiff in complete liquidation and in complete liquidation and cancellation of all of its outstanding [4] stock which was then owned solely by Plaintiff. At said time Plaintiff surrendered her stock for cancellation and retirement and said stock was cancelled and retired and has not since been reissued. In due course thereafter The Quickwork Company was dissolved.

### IX.

The stock in The Quickwork Company owned by Plaintiff at the time of said liquidation was held by her at an adjusted basis of \$34,000. She received in the final liquidation with respect thereto assets of a total value of \$39,204.26 exclusive of the right to the percentage payments under the agreement of May 31, 1940. Long term capital gain of \$5,204.26 was reported by Plaintiff in her 1940 Federal Income Tax return and no adjustment in said return was made upon audit by the appropriate Federal Revenue Agent's office. At the time Plaintiff received in liquidation of her stock in The Quickwork Company the contractual right against the Whiting Corporation in the percentage payments to be paid under the contract of May 31, 1940, said contractual right had a very substantial value and Plaintiff realized and acknowledged that it had such a value. There was no way of ascertaining the measure of said value and said contractual right then had no ascertainable fair market value. Because of this no value was assigned to said right in determining the amount of Plaintiff's capital gain upon said liquidation.

## X.

Neither in her Federal Income Tax return for 1940 nor in any other way at any time has the Plaintiff represented or implied to anyone that said contract did not have a substantial value at the time of the liquidation of The Quickwork Company. During the year 1940 subsequent to the liquidation, Plaintiff received as percentage payments from the Whiting Corporation under said agreement a total of \$2,583.23. These were reported as ordinary income under Schedule C of Plaintiff's 1940 Income Tax return. She left the preparation of said returns to a reputable accounting firm and did not seek any [5] advice nor give any consideration to the question of how said percentage payments should be reported for tax purposes.

## XI.

During the calendar year 1941 Plaintiff received as percentage payments from Whiting Corporation under the aforesaid contract \$37,231.68. In her Federal Income Tax return for said calendar year Plaintiff reported said payments as ordinary income. The tax shown as due per return was \$13,272.40. Said return was filed with the Collector of Internal Revenue for the Tenth District of Ohio. Payments by the Plaintiff in satisfaction of the liabilities shown per return and a small deficiency assessment based thereon were as follows:

<u>Date</u>	<u>Amount</u>
March 14, 1942	\$3,318.40
June 9, 1942	3,318.40
September 10, 1942	5,636.80
December 8, 1942	998.80
August 1, 1943	149.53

## XII.

All of the aforesaid payments were paid to the Collector of the Tenth District of Ohio. At the time of each said payment Frazier Reams was the Collector of said District. He ceased to be Collector of said District on February 1, 1944 and has not at any time subsequent to said date been Collector of that or any other Federal Collection District.

## XIII.

The aforesaid payments received by Plaintiff during 1941 under the percentage provisions of the aforesaid contract of May 31, 1940 with the Whiting Corporation constituted capital gain to Plaintiff realized upon the surrender of her stock in The Quickwork Company upon the complete liquidation of said corporation. The correct income tax liability of the Plaintiff for the year 1941 computed as [6] heretofore approved by the Bureau of Internal Revenue with the sole exception that said payments are treated as long term capital gain rather than ordinary income, was and is \$4,276.52. The total payments made by Plaintiff heretofore with respect to said year 1941 were \$13,421.93 and Plaintiff has overpaid her tax for said year by \$9,145.41.

## XIV.

Pursuant to Provisions of Section 322 of the Internal Revenue Code, Plaintiff filed with the Collector for the Tenth District of Ohio, within the period allowed by law, a proper claim for refund in the amount of \$9,146.61 for refund of said overpayment. A true copy of said claim is attached hereto, marked Exhibit "B" and incorporated

herein by reference as if fully set forth herein. Under date of June 11, 1947 Plaintiff was advised by a written notice sent by registered mail by the Commissioner of Internal Revenue pursuant to Section 3772(a)(2) of the Internal Revenue Code that said claim for refund had been disallowed in full. No further action has been taken with respect to said claim since and no part of said overpayment has been refunded or credited to the Plaintiff.

## SECOND CAUSE OF ACTION

For her Second Cause of Action Plaintiff alleges as follows:

### I.

Plaintiff realleges Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of her First Cause of Action herein as if fully set forth in this, her Second Cause of Action, in haec verba.

### II.

During the calendar years 1942 and 1943 Plaintiff received as percentage payments from the Whiting Corporation under the aforesaid contract respectively \$65,808.26, and \$65,412.64. In her Federal Income Tax return for the calendar years 1942 and 1943 [7] Plaintiff reported said payments as ordinary income. The tax shown as due per said returns was respectively \$37,179.21 and \$9,038.45. Said return for the year 1942 was filed with the Collector of Internal Revenue for the Tenth District of Ohio and the return for the year 1943 was filed with the Collector of Internal Revenue for the Sixth Dis-

district of California. Payments made by Plaintiff in satisfaction of the liability shown per said returns were as follows:

<u>Date</u>	<u>Amount</u>
February 19, 1943	\$ 9,294.82
June 12, 1943	9,294.80
September 13, 1943	8,294.80
December 11, 1943	10,294.81
March 15, 1944	4,519.24
December 28, 1944	4,519.21

Under the provisions of the Current Tax Payment Act of 1943 all of said payments were applied against Plaintiff's 1943 liability and the true tax liability of the Plaintiff for the year 1942 was and is discharged and the liability for said year and the year 1943 was and is accumulated as the liability for the year 1943.

### III.

All of the payments set forth in Paragraph II above, up to and including the payment made on December 11, 1943 were paid to the Collector of the Tenth District of Ohio. At the time of all of said payments Frazier Reams was the Collector of said District. He ceased to be Collector of said District on February 1, 1944 and has not at any time subsequent to said date been Collector of that or any other Federal Collection District.

### IV.

The aforesaid payments received by Plaintiff during 1942 and 1943 under the percentage provisions of the

herein by reference as if fully set forth herein. Under date of June 11, 1947 Plaintiff was advised by a written notice sent by registered mail by the Commissioner of Internal Revenue pursuant to Section 3772(a)(2) of the Internal Revenue Code that said claim for refund had been disallowed in full. No further action has been taken with respect to said claim since and no part of said overpayment has been refunded or credited to the Plaintiff.

## SECOND CAUSE OF ACTION

For her Second Cause of Action Plaintiff alleges as follows:

### I.

Plaintiff realleges Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of her First Cause of Action herein as if fully set forth in this, her Second Cause of Action, in haec verba.

### II.

During the calendar years 1942 and 1943 Plaintiff received as percentage payments from the Whiting Corporation under the aforesaid contract respectively \$65,808.26, and \$65,412.64. In her Federal Income Tax return for the calendar years 1942 and 1943 [7] Plaintiff reported said payments as ordinary income. The tax shown as due per said returns was respectively \$37,179.21 and \$9,038.45. Said return for the year 1942 was filed with the Collector of Internal Revenue for the Tenth District of Ohio and the return for the year 1943 was filed with the Collector of Internal Revenue for the Sixth Dis-

district of California. Payments made by Plaintiff in satisfaction of the liability shown per said returns were as follows:

<u>Date</u>	<u>Amount</u>
February 19, 1943	\$ 9,294.82
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Under the provisions of the Current Tax Payment Act of 1943 all of said payments were applied against Plaintiff's 1943 liability and the true tax liability of the Plaintiff for the year 1942 was and is discharged and the liability for said year and the year 1943 was and is accumulated as the liability for the year 1943.

### III.

All of the payments set forth in Paragraph II above, up to and including the payment made on December 11, 1943 were paid to the Collector of the Tenth District of Ohio. At the time of all of said payments Frazier Reams was the Collector of said District. He ceased to be Collector of said District on February 1, 1944 and has not at any time subsequent to said date been Collector of that or any other Federal Collection District.

### IV.

The aforesaid payments received by Plaintiff during 1942 and 1943 under the percentage provisions of the

aforesaid contract of May 31, 1940 with the Whiting Corporation constituted capital [8] gain to the Plaintiff realized upon the surrender of her stock in The Quickwork Company upon the complete liquidation of said corporation. The correct Income Tax liability of the Plaintiff for the year 1943 computed in accordance with the 1942 and 1943 returns previously filed with the sole exception that said payments are treated as long term capital gain rather than ordinary income was and is \$17,252.03. The total payments heretofore made by Plaintiff with respect to said year 1943 were \$46,216.88 and Plaintiff has overpaid her tax for said year by \$28,964.85.

## V.

Pursuant to the provisions of Section 322 of the Internal Revenue Code Plaintiff filed with the Collector for the Sixth District of California within the period allowed by law a claim for refund of said overpayment of \$28,965.65. A true copy of said claim is attached hereto marked Exhibit "C" and incorporated herein by reference as if fully set forth herein. Under date of June 10, 1947 Plaintiff was advised by a written notice sent by registered mail by the Commissioner of Internal Revenue pursuant to Section 3772(a) (2) of the Internal Revenue Code that said claim for refund had been disallowed in full. No further action has been taken with respect to said claim since and no part of said overpayment has been refunded or credited to the Plaintiff.

### THIRD CAUSE OF ACTION

For her Third Cause of Action Plaintiff alleges as follows:

#### I.

Plaintiff realleges Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of her First Cause of Action herein, and Paragraphs II, III, IV and V of her Second Cause of Action herein, as if fully set forth in this her Third Cause of Action in haec verba. [9]

#### II.

The payments listed in Paragraph II hereinabove in Plaintiff's Second Cause of Action herein paid on March 15, 1944 and December 28, 1944 were paid to Defendant Harry C. Westover as Collector of the Sixth District of California. Said Defendant has continuously since the dates of said payments held and now occupies said position.

Wherefore, Plaintiff prays judgment:

(a) Against the Defendant, the United States of America, in the amount of \$28,068.61 plus interest as provided by law, and

(b) Against Defendant, Harry C. Westover, in the amount of \$9,038.45 plus interest as provided by law, and

(c) For her costs and disbursements herein and such other relief as the Court may deem meet and proper.

GIBSON, DUNN & CRUTCHER

By Bert A. Lewis

Attorneys for Plaintiff [10]

## EXHIBIT "A"

## AGREEMENT

This Agreement, Made and entered into this 31st day of May, A.D. 1940, by and between The Quickwork Company, a corporation organized and existing under and by virtue of the laws of the State of Ohio and authorized to transact business in the State of Illinois, hereinafter referred to as "Quickwork", party of the first part, and Whiting Corporation, a corporation organized and existing under and by virtue of the laws of the State of Illinois, hereinafter referred to as "Whiting", party of the second part, Witnesseth:

Whereas, Quickwork is engaged in the manufacture of Plate and Sheet Metal Workers Machinery and is desirous of selling substantially all of its assets, including the good will of the business heretofore carried on by it, the assets being more particularly hereinafter mentioned, to Whiting on the terms and conditions hereinafter mentioned; and

Whereas, Whiting is engaged in the business of manufacturing and selling various and sundry devices and machinery and is willing and desirous of purchasing said assets of Quickwork as a going business, subject to the terms and conditions hereinafter set forth:

Now, Therefore, in consideration of the premises and of the warranties hereinafter made and the mutual promises and agreements hereinafter entered into, It Is Agreed by and between the parties hereto as follows:

I. Quickwork hereby agrees to sell, assign, transfer and deliver to Whiting, and Whiting agrees to purchase from Quickwork on the closing date hereafter set forth, the following: [11]

- (a) All of the good will of the business now or heretofore carried on by Quickwork, including all business correspondence with customers, all furniture and office fixtures in the office in the Daily News Building in Chicago, Illinois.
- (b) All inventories of the products or parts thereof which are now in the custody of or owned by Quickwork, more particularly described in the list attached hereto and by reference thereto incorporated herein, said list being hereby identified as List No. "1".
- (c) All rights in the trade name "Quickwork" and to the business conducted by Quickwork.
- (d) All patents and applications for Letters Patents and trademarks, patterns jigs, tools, dies, fixtures, drawings and equipment which are applicable to or are used in connection with the manufacture or sale of Quickwork machinery.
- (e) Any and all royalties and other fee arrangement agreements heretofore entered into by Quickwork and all right, title and interest of Quickwork in the avails and proceeds of such agreements.
- (f) All unfilled orders or partially filled orders now in the hands of Quickwork for any of its products or parts thereof, which orders are more particularly described in the list attached hereto and by reference thereto incorporated herein, said list being hereby identified as List No. "2".

II. All of the property herein agreed to be sold shall be conveyed and transferred by proper Bills of Sale containing the usual warranties of title. Quickwork warrants that all of said property is and will be on the closing date

free and clear of all [12] liens, charges and encumbrances of every kind, character and description.

III. Whiting agrees that it will assume and perform all of Quickwork's unfilled contracts and orders as disclosed by the list heretofore identified as List No. "2". Quickwork will furnish to Whiting on the closing date executed originals or copies of all such unfilled contracts, if any, and all original unfilled sales orders.

IV. It is expressly understood and agreed that Whiting does not assume nor agree to pay, and shall not be obligated in any manner for any of the debts of Quickwork and that Whiting does not assume any of its contracts or obligations of any kind or character except only as herein expressly specified. This clause does not apply to commissions due or to become due to agents who have sold Quickwork products, or to existing advertising contracts or orders heretofore given to Kling Bros. for stock cutters which are undelivered at date of closing. A list of such commissions and advertising contracts and cutter orders is hereto attached, and it is agreed that these shall be assumed and paid by Whiting.

V. All other obligations and indebtedness of Quickwork shall be paid by it as soon after the date hereof as possible. Quickwork agrees to furnish to Whiting on the closing date a written statement under oath containing a full, accurate and complete list of its then creditors, their addresses and the amounts owing to each, or, if there be no creditors, a written statement under oath to that effect, and agrees to permit Whiting to withhold out of the sums herein agreed to be paid an amount of equal to the sum of its unpaid obligations. Whiting will either pay said obligationse or indebtedness of Quickwork to the extent of the amount remaining in its hands, but only upon

Quickwork's order so to do, or will retain the amount so withheld until [13] Quickwork, by a written statement under oath, certifies that all its obligations and indebtednesses are in fact paid, and thereupon Whiting will pay to Quickwork, upon demand in writing therefore by Quickwork, the amount then remaining in its hands.

VI. Quickwork agrees that Whiting, through its duly authorized representatives, may at any time enter upon the premises of Quickwork for the purpose of examining any of the objects which are subject to this Agreement. Whiting, through its duly authorized representatives, may also at any time examine any of the books of account, invoices, records and other papers of Quickwork insofar as they relate to the subject matters of this Contract, and make such extracts therefrom as it may desire.

VII. Quickwork further agrees that upon the consummation of said sale it will forthwith, or from time to time, upon demand by Whiting, execute or cause to be executed such other and further appropriate and reasonable instruments of transfer as may be required by Whiting for the purpose of carrying out the intentions and provisions of this Agreement.

VIII. It is further understood and agreed that Whiting plans to manufacture and sell tools and machines heretofore developed and sold by Quickwork; that it will advertise, promote and develop the manufacturing and sale thereof and use all diligent and reasonable efforts in connection therewith. Whiting further agrees that while this agreement is in force and effect it will not sell or offer for sale plate or sheet metal machinery of the kind or type other than that now manufactured by Quickwork, or any machinery in competition with that now manufactured by Quickwork. Whiting further agrees that should it make

any additions or changes or improvements in the line of machinery now purchased by it from Quickwork, or should it develop any machinery which does the same work as is now done by Quickwork, the sale of such machinery by Whiting shall be subject to the pro-[14] visions of Paragraph IX hereof, and ten per cent of the gross sales thereof shall be paid to Quickwork during the entire period of time in which this agreement is in effect. Commissions of Independent dealers not in excess of ten per cent (10%) may be deducted from gross sales.

IX. Whiting hereby agrees to pay to Quickwork as the consideration for all of the property described in Items "a" to "f" both inclusive, of Paragraph No. I of this Agreement, and as consideration of this Agreement, the following:

- (a) The sum of Fifteen Thousand (\$15,000) Dollars on the closing date hereinafter referred to.
- (b) Ten per cent (10%) of Whiting's gross sales price, less sales, use or occupational tax, F.O.B. Harvey, Illinois, on all machinery and equipment, including repair parts (less any of such machinery and equipment, if any, returned to Whiting through cancellation or repossession for non-payment) sold by Whiting after the closing date hereof, which machinery and equipment shall have been developed and manufactured by Whiting or upon its order, as a result of the acquiring by Whiting of the various articles hereinbefore referred to. Commissions of Independent Dealers not in excess of ten per cent (10%) may be deducted from gross sales.

- (c) Ten per cent (10%) of all royalties and other fees received by Whiting after the closing date hereof under and by virtue of the Agreements referred to in Item "c" of Paragraph No. I of this Agreement.
- (d) On all unfilled orders, including all orders in process of manufacture and undelivered order, Whiting shall pay to Quickwork fifty per cent (50%) of the net profit. In computing such net profit no factory or administra- [15] tive overhead shall be charged by Whiting.
- (e) The order from The E. L. Essley Machinery Company for Six Thousand Eight Hundred Four and 90/100 (\$6,804.90) Dollars and the order from Joseph T. Ryerson & Son Inc. for Fourteen Thousand Five Hundred (\$14,500.00) Dollars, less ten per cent (10%), now on hand are to come under the provisions of Clause "b" hereof and not under the provisions of Clause "d".

Whiting shall make its first accounting and payment to Quickwork for the period ending August 31, 1940, on or before September 21st, 1940, and shall make all further and subsequent accountings and payments to Quickwork for every three (3) months thereafter on or before the twenty-first day of the month following such three (3) months' period. All payments shall be made at the office of Whiting in Harvey, Illinois. Quickwork shall have the right at all reasonable times to examine the books of Whiting to determine the correctness of all payments due or to become due to it under this Agreement.

The ten per cent (10%) of the gross sales price, as set forth in Section IX (b) shall be paid to Quickwork or its

assignee quarterly during the entire lifetime of Agnes F. Smith, (who is the Vice-President of Quickwork). In the event of the death of said Agnes F. Smith prior to May 31, 1950, said percentage of the gross sales shall be paid by Whiting to the Estate of said Agnes F. Smith and shall continue from the date of her death to May 31, 1950; following this date Whiting shall not be obligated to pay. Nothing herein contained shall be construed in any way to limit the payment of ten per cent of the gross sales price to Agnes F. Smith during her entire lifetime.

Quickwork has reserved to itself and there is not included in the sale to Whiting the following: [16]

- (a) Cash on hand and in the bank
- (b) Accounts and notes receivable
- (c) All real property now owned by it
- (d) All property not now used by it in the manufacture or sale of Quickwork machinery.

X. It is mutually agreed that the closing date, for the closing and consummation of the sale herein provided for, shall be May 31, A.D. 1940.

XI. It is further understood and agreed that time is of the essence of this Contract and that the terms, provisions and conditions thereof shall be binding upon and inure to the use of the several parties hereto and their respective successors and assigns.

XII. Any and all controversies arising under or out of, or in connection with or relating to, or for the breach of, this Agreement, shall be settled by arbitration, in ac-

cordance with the rules then obtaining of the American Arbitration Association, and judgment upon any award rendered may be entered in any court, state or federal, having jurisdiction in the premises. The invalidity of this paragraph shall not affect the other Agreements herein set forth.

In Witness Whereof, the party of the first part has caused these presents to be executed by its Vice-President, attached by its ..... Secretary and its Corporate Seal to be affixed hereto, and the party of the second part has caused these presents to be executed by its Vice-President, attested by its ..... Secretary and its Corporate Seal to be hereto affixed the day and year first above written.

THE QUICKWORK COMPANY

By A. F. Smith,  
Vice-President

Attest:

Margaret Gairoard,  
Secretary [17]

WHITING CORPORATION

By R. E. Prussing,  
Vice-President

Attest:

R. A. Pascoe,  
Secretary [18]

## EXHIBIT "B"

Form 843

Treasury Department  
Internal Revenue Service  
(Revised April 1940)

## CLAIM

To Be Filed With the Collector Where Assessment Was  
Made or Tax Paid

The Collector will indicate in the .....  
block below the kind of claim filed, Collector's Stamp  
and fill in the certificate on the re- (Date received)  
verse side.

- ☐ Refund of Tax Illegally Collected.
- ☐ Refund of Amount Paid for Stamps  
Unused, or Used in Error or Excess. ....
- ☐ Abatement of Tax Assessed (not ap-  
plicable to estate or income taxes).

State of Ohio

County of Anglaize—ss:

\_\_\_\_\_ Name of taxpayer or  
Type purchaser of stamps Agnes F. Smith  
or Business Address.....  
(Street) (City) (State)  
Print Residence 123 S. Gunston Drive, Los Angeles  
\_\_\_\_\_ 24, Calif.

The deponent, being duly sworn according to law, de-  
poses and says that this statement is made on behalf of

the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed 10th Ohio
2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1941, to Dec. 31, 1941
3. Character of assessment or tax Income tax [19]
4. Amount of assessment, \$13,423.13; dates of payment 3/14/42, 6/9/42, 8/2/42, 9/10/42 and 12/8/42
5. Date stamps were purchased from the Government .....
6. Amount to be refunded ..... \$9,146.61
7. Amount to be abated (not applicable to income or estate taxes) ..... \$.....
8. The time within which this claim may be legally filed expires, under Section 322(b)(1) I. R. C. on March 5, 1945. The deponent verily believes that this claim should be allowed for the following reasons:

See attached

---

(Attach letter-size sheets if space is not sufficient)

Sworn to and subscribed before me this 26 day of February, 1945

Signed Agnes F. Smith

.....

.....

(Title)

.....,  
(Signature of officer administering oath)

(Claim was properly notarized but name of Notary is not now known.)

(See Instructions on Reverse Side)

## AGNES F. SMITH

## CLAIM FOR REFUND

For the Year Ended December 31, 1941

Pursuant to an agreement dated May 31, 1940 between the Quickwork Corporation located in Chicago, Illinois, of which the taxpayer was Vice-President, and the Whiting Corporation located in Chicago, Illinois, substantially all of the assets of Quickwork Corporation were sold to Whiting Corporation for cash and the right to receive 10% of the gross sales of Whiting Corporation for the taxpayer's lifetime or ten years certain.

Neither the Quickwork Corporation nor the taxpayer retained any interest whatsoever in the tangible assets, goodwill, patents, trade name, etc. transferred to the Whiting Corporation.

Upon dissolution of the Quickwork Corporation, on August 24, 1940, the taxpayer received, as payment for her stock, cash, the remaining tangible assets and the right to receive 10% of the gross sales of the Whiting Corporation as mentioned in the first paragraph above.

It is contended that the monies received by the taxpayer are deferred payments on the assets sold to the Whiting Corporation and that they are in the nature of liquidating dividends to the taxpayer by virtue of the transfer of the right to her.

The stock of the Quickwork Corporation was acquired by the taxpayer in 1933. Upon liquidation of the corporation the cost of her stock was fully recovered. Accordingly, the entire amount received during the taxable year was a long-term capital gain.

The following supporting authorities are cited: U. S. v. Dorothy D. Yerger (D. C. Penna.; 1944), 55 F. Supp. 521; and Imperial Type Metal Co. v. Commissioner (C. C. A.-3), 106 F. (2d) 302, 23 A. F. T. R. 347. [21]

A recomputation of the tax based on the contention of the Taxpayer is as follows:

(Continued)—1.

AGNES F. SMITH

CLAIM FOR REFUND

For the Year Ended December 31, 1941

Net income, per Revenue Agent's Report.....	\$37,676.16
Less—Reduction in income due to payments from the Whiting Corporation being included as a long-term capital gain instead of as a royalty .....	18,615.84
Adjusted taxable income.....	\$19,060.32
Less—Personal exemption.....	1,500.00
Surtax net income.....	\$17,560.32
Less—Earned income credit.....	300.00
Normal tax net income.....	\$17,260.32
Normal tax .....	\$ 690.41
Surtax .....	3,586.11
Total.....	\$ 4,276.52
Tax previously assessed.....	13,423.13
Overassessment .....	\$ 9,146.61

(Concluded)—2. [22]

## EXHIBIT "C"

Form 843

Treasury Department  
Internal Revenue Service  
(Revised April 1940)

## CLAIM

To Be Filed With the Collector Where Assessment Was  
Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

.....  
Collector's Stamp  
(Date received)

- ☐ Refund of Tax Illegally Collected
- ☐ Refund of Amount Paid for Stamps  
Unused, or Used in Error or Excess. ....
- ☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

State of California

County of Los Angeles—ss:

\_\_\_\_\_ Name of taxpayer or  
Type purchaser of stamps Agnes F. Smith  
or Business address .....  
Print Residence 123 S. Gunston Drive, Los Angeles  
\_\_\_\_\_ 24, Calif.

(Street) (City) (State)

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of

the taxpayer named and that the facts given below are true and complete:

1. District in which return (if any) was filed 6th Calif.
2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1943, to Dec. 31, 1943.
3. Character of assessment or tax Income
4. Amount of assessment, \$46,217.68; dates of payment [23] 2/19/43, 6/12/43, 9/13/43, 12/11/43, 3/15/44 & 12/28/44
5. Date stamps were purchased from the Govern-
6. Amount to be refunded ..... \$28,965.65
7. Amount to be abated (not applicable to income or estate taxes) ..... \$.....
8. The time within which this claim may be legally filed expires, under Section 322(b)(1) I. R. C. on March 15, 1947. The deponent verily believes that this claim should be allowed for the following reasons:

See attached

---

(Attach letter-size sheets if space is not sufficient)

Sworn to and subscribed before me this 26 day of February, 1945

Signed Agnes F. Smith

.....

.....

(Title)

.....,  
(Signature of officer administering oath)

(Claim was properly notarized but name of Notary is not now known.)

(See Instructions on Reverse Side)

AGNES F. SMITH  
CLAIM FOR REFUND

For the Year Ended December 31, 1943

Pursuant to an agreement dated May 31, 1940 between the Quickwork Corporation located in Chicago, Illinois, of which the taxpayer was Vice-President, and the Whiting Corporation located in Chicago, Illinois, substantially all of the assets of Quickwork Corporation were sold to Whiting Corporation for cash and the right to receive 10% of the gross sales of Whiting Corporation for the taxpayer's lifetime or ten years certain.

Neither the Quickwork Corporation nor the taxpayer retained any interest whatsoever in the tangible assets, goodwill, patents, trade name, etc. transferred to the Whiting Corporation.

Upon dissolution of the Quickwork Corporation, on August 24, 1940, the taxpayer received, as payment for her stock, cash, the remaining tangible assets and the right to receive 10% of the gross sales of the Whiting Corporation as mentioned in the first paragraph above.

It is contended that the monies received by the taxpayer are deferred payments on the assets sold to the Whiting Corporation and that they are in the nature of liquidating dividends to the taxpayer by virtue of the transfer of the right to her.

The stock of the Quickwork Corporation was acquired by the taxpayer in 1933. Upon liquidation of the corporation the cost of her stock was fully recovered. Accordingly, the entire amount received during the taxable year was a long-term capital gain.

The following supporting authorities are cited: U. S. v. Dorothy D. Yerger (D. C. Penna., 1944), 55 F. Supp.

521; and Imperial Type Metal Co. v. Commissioner (C. C. A.-3), 106 F. (2d) 302, 23 A. F. T. R. 347.

A recomputation of the tax based on the contention of the [25] taxpayer is as follows:

AGNES F. SMITH

CLAIM FOR REFUND

For the Year Ended December 31, 1943

Net income, per 1942 return.....	\$65,886.27	
Less—Reduction in income due to payments from the Whiting Corporation being in- cluded as a long-term capital gain instead of a royalty.....	32,904.13	
Adjusted net income.....	\$32,982.14	
Less:		
Personal exemption.....	\$ 500.00	
Credit for dependents.....	350.00	850.00
Surtax net income.....	\$32,132.14	
Less—Earned income credit.....	300.00	
Normal tax net income.....	\$31,832.14	
	=====	
Normal tax .....	\$ 1,909.93	
Surtax .....	12,396.64	
Total.....	\$14,306.57	
	=====	

	Income Tax	Victory Tax
--	---------------	----------------

1. Net income, per 1943 return	\$61,906.07	\$65,398.64
--------------------------------	-------------	-------------

2. Less—Reduction in income due to payments from the		
---	--	--

Whiting Corporation being included as a long-term capital gain instead of a royalty.....		32,706.32	65,412.65
		<u>\$29,199.75</u>	<u>\$ 14.01</u>
3. Less—Personal exemption....	1,200.00		
4. Surtax net income.....	\$27,999.75		
5. Less—Earned income credit	300.00		
6. Normal tax net income.....	<u>\$27,699.75</u>		
7. Normal tax .....	\$ 1,661.99		
8. Surtax .....	10,119.86	[26]	
9. Victory tax.....	None		
10. Total.....	<u>\$11,781.85</u>		
11. Income tax for 1942.....	<u>\$14,306.57</u>		
12. Larger of Lines 10 and 11....	\$14,306.57		
13. Smaller of Lines 10 and 11.....	\$11,781.85		
14. 75% of Line 13	8,836.39		
Unforgiven part of tax.....	<u>2,945.46</u>		
Total income and victory tax	\$17,252.03		
Tax previously assesses.....	<u>46,217.68</u>		
Overassessment .....	<u>\$28,965.65</u>	[27]	

[Verified.]

[Endorsed]: Filed Aug. 11, 1947. Edmund L. Smith,  
Clerk. [28]

[Title of District Court and Cause]

ANSWER TO PLAINTIFF'S COMPLAINT

Comes now the defendants, Harry C. Westover, Collector of Internal Revenue, Sixth District of California, and the United States of America, by their attorney, James M. Carter, United States Attorney in and for the Southern District of California, and for an answer to plaintiff's complaint herein, admit, deny and allege as follows:

FIRST CAUSE OF ACTION

I.

The allegations in paragraph I are admitted.

II.

The allegations in paragraph II are admitted.

III.

The allegations in paragraph III are admitted. [30]

IV.

The allegations in paragraph IV are admitted.

V

Answering paragraph V, defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein set forth.

VI.

The allegations in paragraph VI are admitted.

VII.

The allegations in paragraph VII are admitted.

VIII.

The allegations in paragraph VIII are admitted.

IX.

The allegations in paragraph IX are admitted.

## X.

The allegations in paragraph X are admitted except that defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff left the preparation of her returns entirely to the accounting firm and did not seek other advice or give other consideration to the question of how said percentage payments should be reported for tax purposes.

## XI.

The allegations in paragraph XI are admitted except as to the dates and payments therein set forth. The defendants allege that the payments were made on the following dates:

March 18, 1942.....	\$3,318.40
June 20, 1942.....	\$3,318.40
September 19, 1942.....	\$5,638.00
December 12, 1942.....	\$ 998.80
August 18, 1942.....	\$ 152.89

## XII.

The allegations in paragraph XII are admitted. [31]

## XIII.

Answering paragraph XIII, defendants allege that the total payments by plaintiff for the year 1941 aggregated \$13,426.49, instead of the amount alleged. Defendants deny each and every material allegation in paragraph XIII.

## XIV.

Answering paragraph XIV, defendants admit that plaintiff filed a claim for refund with the Collector for the Tenth District of Ohio, within the period allowed by law and that a true copy of said claim is attached to the complaint as Exhibit B. Defendants deny that said claim

was a proper claim for refund and deny the correctness and truth of the averments contained and set forth therein and the contentions advanced in said claim. Defendants deny there has been any overpayment of taxes by plaintiff as alleged. Defendants admit that the claim for refund was rejected on June 11, 1947, as alleged.

## SECOND CAUSE OF ACTION

### I.

For an answer to paragraph I, defendants repeat the allegations of their answer to paragraphs I to X, inclusive, of the plaintiff's First Cause of Action as if fully set forth in this paragraph of answer and thereby repeat the same allegations as an answer to paragraph I of the Second Cause of Action.

### II.

The allegations of paragraph II are admitted.

### III.

The allegations of paragraph III are admitted.

### IV.

Answering paragraph IV, defendants allege that the aggregate payments made by plaintiff with respect to the year 1943, were \$46,217.68 instead of \$46,216.88, as alleged. The remaining allegations in paragraph IV are denied. [32]

### V.

Answering paragraph V, defendants admit that plaintiff filed a claim for refund with the Collector for the Tenth District of Ohio, within the period allowed by law and that a true copy of said claim is attached to the complaint as Exhibit C. Defendants deny that said claim was a proper claim for refund and deny the correctness and truth of the averments contained and set forth therein and the contentions advanced in said claim. Defendants deny

there has been any overpayment of taxes by plaintiff as alleged. Defendants admit that the claim for refund was rejected on June 10, 1947, as alleged.

### THIRD CAUSE OF ACTION

#### I.

For an answer to paragraph I, defendants repeat the allegations of their answer to paragraphs I to X, inclusive, of plaintiff's First Cause of Action herein and paragraphs II to V. inclusive of plaintiff's Second Cause of Action herein as if fully set forth in this paragraph of answer and makes the same allegations as an answer to paragraph I of plaintiff's Third Cause of Action.

#### II.

The allegations in paragraph II are admitted.

Further answering the complaint, the defendants deny that plaintiff is entitled to recover anything against these defendants or either of them.

Wherefore, defendants pray that the complaint be dismissed with costs and for all just and proper relief.

JAMES M. CARTER

United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Assistant U. S. Attorneys

EUGENE HARPOLE

Special Attorney

Bureau of Internal Revenue

By George M. Bryant

Attorneys for Defendants [33]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Oct. 21, 1947. Edmund L. Smith,  
Clerk. [34]

[Title of District Court and Cause]

STIPULATION TO TAKE CASE OFF PRE-TRIAL  
HEARING CALENDAR AND TO SET CASE  
FOR HEARING ON MOTION FOR SUMMARY  
JUDGMENT

It Is Hereby Stipulated and Agreed by and between counsel for Agnes F. Smith, plaintiff, and Harry C. Westover, United States Collector of Internal Revenue, Sixth District of California, and United States of America, defendants, that, subject to the approval of the Court, the above case may be removed from and stricken off the pre-trial hearing calendar set for December 8, 1947, and that the above case may be set for hearing at 10:00 a.m. on Monday, January 5, 1948, (or any other date agreeable to the Court), before the Honorable William C. Mathes, United States District Judge upon plaintiff's Motion for Summary Judgment in accordance with Rule 56 of the Federal Rules of Civil Procedure. This Stipulation is submitted since a hearing on said Motion for Summary Judgment may render unnecessary the pretrial hearing which would otherwise [35] be required herein. Prior to the hearing on the Motion for Summary Judgment, counsel for the defendants need to obtain further instructions from the Attorney General of the United States, and the setting of the hearing on the Motion for Summary Judgment on the above date of January 5, 1948, would furnish adequate time for the foregoing purposes.

Dated: This 2nd day of December, 1947.

GIBSON, DUNN & CRUTCHER

By Bert A. Lewis,

Attorneys for Plaintiff

JAMES M. CARTER

United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Assistant United States  
Attorneys

EUGENE HARPOLE and

LOREN P. OAKES

Special Attorneys

Bureau of Internal Revenue

By Eugene Harpole

Attorneys for Defendants

## ORDER

Pursuant to the Foregoing Stipulation it is hereby Ordered on the 4 day of December, 1947, that the above case be removed from and stricken off the foregoing pre-trial calendar set for December 8, 1947, and it is further ordered that the above Motion by plaintiff for Summary Judgment be set for hearing as above set forth on January 12, 1948, at 10:00 a.m.

WILLIAM C. MATHES

United States District Judge

[Endorsed]: Filed Dec. 4, 1947. Edmund L. Smith,  
Clerk, [36]

[Title of District Court and Cause]

PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT

Now Comes Agnes F. Smith, plaintiff, by Bert A. Lewis, her attorney, and moves the court to enter judgment for the plaintiff for the relief demanded in her affidavit hereto attached, in accordance with Rule 56 of the Federal Rules of Civil Procedure,

GIBSON, DUNN & CRUTCHER

By Bert A. Lewis  
Attorneys for Plaintiff

[Endorsed]: Filed Dec. 31, 1947. Edmund L. Smith,  
Clerk. [40]

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[Title of District Court and Cause]

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT

State of California  
County of Los Angeles—ss.

Agnes F. Smith, being first duly sworn, deposes and says:

1. She is the plaintiff in the above entitled action.
2. Said action is brought by her to recover overpayments of Federal Income Taxes for the years 1941 and 1943 which resulted from her treating certain payments received by her under a contract with the Whiting Corporation erroneously as ordinary income whereas they should have been reported as capital gain. In 1940 The

Quickwork Company, a corporation controlled by the plaintiff, sold practically all of its assets to said Whiting Corporation for various considerations, including a promise of the Whiting Corporation to pay to the [41] seller, The Quickwork Company, 10% of the gross sales price to the Whiting Corporation on certain sales thereafter made by it. Subsequent to this transfer The Quickwork Company completely liquidated and dissolved and plaintiff received as a part of the assets in exchange for her stock the percentage contract against the Whiting Corporation. The present suit involves the tax character of payments thereafter received by plaintiff with respect to said contract.

3. In paragraph V of her Complaint herein plaintiff alleged as follows:

“The contract of sale between the Quickwork Company and the Whiting Corporation was an arms-length transaction in which each party was interested in making the best bargain possible. The Directors and stockholders of the Whiting Corporation were not related or interested in any way in The Quickwork Company nor was The Quickwork Company, its stockholders, or directors interested or related in any way to the Whiting Corporation. Plaintiff as the controlling officer and stockholder of The Quickwork Company attempted to secure the best bargain possible for that Company and in connection with such negotiations did not solicit nor receive any advice concerning the tax consequences to The Quickwork Company or herself of the various counter proposals made during said negotiations or the agree-

ment as finally executed. For many years prior to said sale the annual sales of The Quickwork Company had been substantial and both parties to said agreement realized that the impending War would be likely to increase considerably the demand for and sales of The Quickwork line."

Each allegation and statement of fact in said paragraph is [42] true and correct and is within the personal knowledge of plaintiff.

4. In Paragraph X of her Complaint filed herein plaintiff alleged that she left the preparation of her income tax returns for the years 1940 and subsequent years to a reputable accounting firm and did not seek any legal advice on the question of the proper allocation of the percentage payments received under the Whiting Corporation contract between principal and income for tax purposes. Said allegation was and is true and was and is within the personal knowledge of the plaintiff.

5. In their Answer to plaintiff's Complaint herein each of the defendants has admitted every allegation of fact contained therein (with minor but inconsequential variance in certain figures) except they have alleged that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein set forth in paragraph V of said Complaint and that part of the allegations of paragraph X referred to in the immediately preceding paragraph of this Affidavit.

6. The resolution of The Quickwork Company authorizing the transfer of all of its assets to plaintiff in complete liquidation of her stock therein was validly adopted by it on August 23, 1940, and a true and correct copy of said resolution is attached hereto as "Exhibit A." Pursu-

ant to said resolution, on August 24, 1940 The Quickwork Company transferred to plaintiff all of its assets of whatsoever nature except its real estate, by a bill of sale and assignment. a true and correct copy of which is attached hereto as "Exhibit B." The real estate was deeded to plaintiff on or about said date by a separate deed and plaintiff thereupon surrendered all of her stock in The Quickwork Company for cancellation and retirement.

7. At no time prior to the distribution mentioned in the preceding paragraph of this Affidavit did The Quickwork Company make any distribution in liquidation, partial or otherwise. with [43] respect to its stock; there was no intention or plan to liquidate until the principal assets of the Company were transferred to the Whiting Corporation pursuant to the contract of May 31, 1940, as alleged in paragraph IV of the Complaint herein. The only liquidation made thereafter was the final and complete liquidation effected as set forth in the preceding paragraph of this Affidavit.

8. Plaintiff verily believes that there is no genuine issue as to any material fact in this case and that plaintiff is entitled to judgment as a matter of law against each of the defendants as prayed in her Complaint herein.

AGNES F. SMITH

Subscribed and sworn to before me this 31st day of December, 1947.

(Seal)

C. E. CULVER,

Notary in and for the County of Los Angeles,  
State of California.

My Commission Expires June 29, 1950. [44]

EXHIBIT A  
LIQUIDATING RESOLUTION OF  
THE QUICKWORK COMPANY

Resolved: That the President and Secretary of the Company execute such documents of assignment and conveyance as may be necessary to transfer to Agnes F. Smith, the sole shareholder of the Company, all of the real and personal property of the Company as a liquidating dividend on her shares of stock, said property to include specifically the following:

1. Cash on hand and in banks.
2. All accounts receivable, including advances to officers.
3. Any and all claims due or that may accrue in the future from the Whiting Corporation under agreement between The Quickwork Company and the Whiting Corporation, dated May 31, 1940; and for repossessed machines consigned by The Quickwork Company to the Whiting Corporation, having a book value of \$4230.00; and the sum of \$3145.70 due from the Whiting Corporation, being in excess of charges for inventory, patterns (net), patents, experimental machines, etc., amounting to \$18,145.70 less cash collected of \$15,000.00 from Whiting Corporation in accordance with the terms of said agreement dated May 31, 1940.
4. Office furniture and fixtures having a book value of \$50.00.
5. \$140.00 deposit on new Mercury automobile with Wright Motors, Inc., 1822 Ridge Ave., Evanston, Illinois.
6. Insurance policy No. 964825, issued by the New England Mutual Life Insurance Company on the

ant to said resolution, on August 24, 1940 The Quickwork Company transferred to plaintiff all of its assets of whatsoever nature except its real estate, by a bill of sale and assignment, a true and correct copy of which is attached hereto as "Exhibit B." The real estate was deeded to plaintiff on or about said date by a separate deed and plaintiff thereupon surrendered all of her stock in The Quickwork Company for cancellation and retirement.

7. At no time prior to the distribution mentioned in the preceding paragraph of this Affidavit did The Quickwork Company make any distribution in liquidation, partial or otherwise, with [43] respect to its stock; there was no intention or plan to liquidate until the principal assets of the Company were transferred to the Whiting Corporation pursuant to the contract of May 31, 1940, as alleged in paragraph IV of the Complaint herein. The only liquidation made thereafter was the final and complete liquidation effected as set forth in the preceding paragraph of this Affidavit.

8. Plaintiff verily believes that there is no genuine issue as to any material fact in this case and that plaintiff is entitled to judgment as a matter of law against each of the defendants as prayed in her Complaint herein.

AGNES F. SMITH

Subscribed and sworn to before me this 31st day of December, 1947.

(Seal)

C. E. CULVER,

Notary in and for the County of Los Angeles,  
State of California.

My Commission Expires June 29, 1950. [44]

EXHIBIT A  
LIQUIDATING RESOLUTION OF  
THE QUICKWORK COMPANY

Resolved: That the President and Secretary of the Company execute such documents of assignment and conveyance as may be necessary to transfer to Agnes F. Smith, the sole shareholder of the Company, all of the real and personal property of the Company as a liquidating dividend on her shares of stock, said property to include specifically the following:

1. Cash on hand and in banks.
2. All accounts receivable, including advances to officers.
3. Any and all claims due or that may accrue in the future from the Whiting Corporation under agreement between The Quickwork Company and the Whiting Corporation, dated May 31, 1940; and for repossessed machines consigned by The Quickwork Company to the Whiting Corporation, having a book value of \$4230.00; and the sum of \$3145.70 due from the Whiting Corporation, being in excess of charges for inventory, patterns (net), patents, experimental machines, etc., amounting to \$18,145.70 less cash collected of \$15,000.00 from Whiting Corporation in accordance with the terms of said agreement dated May 31, 1940.
4. Office furniture and fixtures having a book value of \$50.00.
5. \$140.00 deposit on new Mercury automobile with Wright Motors, Inc., 1822 Ridge Ave., Evanston, Illinois.
6. Insurance policy No. 964825, issued by the New England Mutual Life Insurance Company on the

life of H. Collier Smith, Jr., with The Quickwork Company as beneficiary, including the prepaid insurance premium thereon, having a book value as of June 30, 1940, of to wit: \$501.79 and including the dividends left with the company having [45] a book value as of June 30, 1940, of to wit: \$112.78.

7. Real estate of the Company in Auglaize County, St. Mary's Township, Ohio. [46]

## EXHIBIT B

### BILL OF SALE AND ASSIGNMENT

For and in consideration of the sum of \$10.00 and other good and valuable consideration, receipt of which is hereby acknowledged, and as a liquidating dividend on those shares of stock of The Quickwork Company, owned and held by Agnes F. Smith, and pursuant to resolution of the Shareholders and Board of Directors of The Quickwork Company duly passed and adopted in accordance with the by-laws and regulations of the said company and the laws of Ohio, the undersigned, The Quickwork Company, does hereby sell, assign, transfer, deliver, set over and convey to Agnes F. Smith the following described items of personal property now owned by and standing in the name of The Quickwork Company:

1. Cash on hand and in banks.
2. All accounts receivable, including advances to officers.
3. Any and all claims due or that may accrue in the future from the Whiting Corporation under agreement between The Quickwork Company and the Whiting Corporation, dated May 31, 1940; and for repossessed machines consigned by The Quickwork Company to the Whiting Corporation, having a book value of \$4230.00; and the sum of \$3145.70

due from the Whiting Corporation, being in excess of charges for inventory, patterns (net), patents, experimental machines, etc., amounting to \$18,145.70 less cash collected of \$15,000.00 from Whiting Corporation in accordance with the terms of said agreement dated May 31, 1940.

4. Office furniture and fixtures having a book value of \$50.00.
5. \$140.00 deposit on new Mercury automobile with Wright Motors, Inc., 1822 Ridge Ave., Evanston, Illinois.
6. Insurance policy No. 964825, issued by the New [47] England Mutual Life Insurance Company on the life of H. Collier Smith, Jr., with The Quickwork Company as beneficiary, including the prepaid insurance premium thereon, having a book value as of June 30, 1940, of to wit: \$501.79 and including the dividends left with the company having a book value as of June 30, 1940, of to wit: \$112.78.

In Witness Whereof, The Quickwork Company has caused these presents to be signed by its President and attested by its Secretary, this 24th day of August, 1940.

THE QUICKWORK COMPANY

(Signed) H. Collier Smith, Jr.

Attested:

Its President

Jalth T. Scott,

Its Secretary [48]

\* \* \* \* \*

Received copy of the within Notice this 31 day of December, 1947. James M. Carter, U. S. Atty.: by Gertrude M. Johnson, Attorneys for Defts.

[Endorsed]: Filed Dec. 31, 1947. Edmund L. Smith, Clerk. [59]

[Title of District Court and Cause]

MOTION BY DEFENDANTS TO TAKE OFF THE  
CALENDAR PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT SET FOR HEARING  
ON JANUARY 12, 1948, AND IN THE  
ALTERNATIVE, COUNTER-MOTION BY DE-  
FENDANTS FOR SUMMARY JUDGMENT

Come now the defendants, Harry C. Westover, Collector of Internal Revenue, Sixth District of California, and the United States of America, by their attorneys above named, and move the Court for reasons hereinafter stated to take off the calendar plaintiff's motion for summary judgment set for hearing on January 12, 1948, and in the alternative the foregoing defendants move the Court by way of counter-motion for a summary judgment in their favor under Rule 56 of the Federal Rules of Civil Procedure. In support of the foregoing motion and counter-motion, the following is stated and shown:

1. On December 4, 1947, pursuant to stipulation by the parties hereto, this Court set January 12, 1948, as the date for hearing of a motion by plaintiff for summary judgment. The foregoing motion by plaintiff, together with supporting and related papers have been served upon the defendants. In such supporting papers plaintiff quotes at great length from the case of *Susan J. Carter*, 9 T. C. No. 54, promulgated September 17, 1947. Plaintiff places her principal [60] reliance on the *Carter* case and states the Tax Court decided the issue here involved ". . . on facts very similar to those involved in the instant case".

2. Subsequent to the above date of December 4, 1947, it has been ascertained that the Chief Counsel for the Bureau of Internal Revenue approved a recommendation that the Commissioner of Internal Revenue nonacquiesce in the above Carter decision and that such case be appealed from the Tax Court to the Second Circuit Court of Appeals. It is most likely that the Department of Justice will likewise concur in the foregoing recommendation and promptly prosecute an appeal to the Second Circuit with respect to the above Carter decision.

3. Defendants represent that the facts in the Carter case are stronger in favor of the taxpayer than are the facts here involved in favor of the instant taxpayer. Under these circumstances it would necessarily follow that if the Second Circuit decides the proposed Carter appeal in the Government's favor, the issues raised by the instant plaintiff's motion for summary judgment should a fortiori be decided in favor of the above defendants. In the interest of conserving the time of both the Court and counsel, the motion by plaintiff for summary judgment should be taken off calendar or otherwise held in abeyance pending a decision by the Second Circuit on the proposed Carter appeal involving facts conceded by plaintiff to be very similar to those here involved.

4. If the foregoing motion to take plaintiff's motion off calendar is not granted, the above defendants request the Court to grant the counter-motion above mentioned. It is understood that plaintiff will endeavor to present at the hearing of her above motion on January 12, 1948, all

the material facts herein. If all material facts are presented, defendants submit that such facts will support a motion for summary judgment in favor of defendants rather than a motion for such judgment in favor of the plaintiff.

5. Under Rule 3 of the Local Rules of this Court, defendants will be required to serve a statement of reasons in opposition to plaintiff's above motion and an answering memorandum of points and authorities and file such statement and answering memorandum and it is requested that the foregoing statement and memorandum be considered to also serve the purpose of constituting [61] the statement of reasons in support of the above counter-motion and the memorandum of points and authorities supporting such counter-motion.

Dated: December 31, 1947.

JAMES M. CARTER  
United States Attorney

E. H. MITCHELL and  
GEORGE M. BRYANT  
Assistant United States  
Attorneys

EUGENE HARPOLE and  
LOREN P. OAKES  
Special Attorneys  
Bureau of Internal Revenue  
By Loren P. Oakes  
Attorneys for Defendants. [62]

[Affidavit of Service by Mail]

[Endorsed]: Filed Dec. 31, 1947. Edmund L. Smith,  
Clerk. [63]

[Title of District Court and Cause]

ORDER DENYING DEFENDANTS' MOTION TO  
TAKE PLAINTIFF'S MOTION FOR SUM-  
MARY JUDGMENT OFF CALENDAR

The above named case coming on this 12th day of January, 1948 to be heard on motion of Plaintiff for Summary Judgment and on motion of defendants to take Plaintiff's Motion off calendar and in the alternative for Summary Judgment, and Counsel being heard for the respective parties;

It Is Hereby Ordered That:

Defendants' Motion to take off calendar Plaintiff's Motion for Summary Judgment be, and the same hereby is overruled and denied.

WM. C. MATHES,  
United States District Judge

The above Order approved as to form this 22 day of January, 1948. James M. Carter, United States Attorney; E. H. Mitchell and George M. Bryant, Asst. U. S. Attys.; Eugene Harpole, Special Atty. Bureau of Internal Revenue; by Eugene Harpole.

[Endorsed]: Filed Jan. 26, 1948. Edmund L. Smith,  
Clerk. [106]

[Title of District Court and Cause]

ORDER ON MOTIONS FOR SUMMARY  
JUDGMENT

This cause having heretofore come before the court for hearing on the motion of plaintiff for summary judgment and the motion of defendants for summary judgment; and the motions having been heard and submitted for decision; and it appearing to the court:

(a) that there is no genuine issue as to any material fact involved in this cause;

(b) that the facts alleged in plaintiff's complaint are true;

(c) that no reason appears which would warrant the court in disregarding the separate corporate entity of Quickwork Company in determining the income tax liability of plaintiff in [142] controversy [Moline Properties Inc. v. Commissioner, 319 U. S. 436 (1943); Rogan v. Starr Piano Co., 139 F. (2d) 671 (C. C. A. 9th, 1943)];

(d) that the Whiting Corporation contract was received by plaintiff in exchange for plaintiff's stock [a capital asset] upon the liquidation of Quickwork Company in 1940, and the contract had no ascertainable fair market value at the time of the exchange [See I. R. C. § 111 (b)];

(e) that since the property [Whiting Corporation contract] received by plaintiff upon liquidation had no ascertainable fair market value, the transaction [liquidation of Quickwork] was not closed at the time of the exchange in 1940 [Burnet v. Logan, 283 U. S. 404 (1931); Commissioner of Internal Revenue v. Hopkinson, 126 F. (2d) 406 (C. C. A. 2d, 1942); United States v. Yerger, 55 Fed. Supp. 521 (E. D. Pa., 1944); Susan J. Carter, 9 T. C. 364 (1947)];

(f) that payments subsequently received by plaintiff under the Whiting Corporation contract, as alleged in the complaint, were accordingly "amounts distributed in complete liquidation" of the Quickwork Company within the meaning of I. R. C. § 115 (c), in exchange for capital assets [Quickwork stock] held by plaintiff for more than six months; hence such payments are taxable to plaintiff as "long term capital gain" pursuant to I. R. C. § 117 (a) (4) [Burnet v. Logan, *supra*, 283 U. S. 404 (1931); Susan J. Carter, *supra*, 9 T. C. 364 (1947)]; and

(g) that plaintiff is therefore entitled, as a matter of law, to judgment against defendants as [143] prayed for in the complaint;

It Is Now Ordered:

(1) that plaintiff's motion for summary judgment against defendants, as prayed for in the complaint, be and is hereby granted;

(2) that defendants' motion for summary judgment be and is hereby denied; and

(3) counsel for plaintiff are directed to submit judgment accordingly—and findings of fact and conclusions of law if so advised [See Rule 52 (a) F R. C. P., as amended March 19, 1948]—pursuant to local rule 7 within 10 days.

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to the attorneys for the parties appearing in this cause.

May 18, 1948.

WM. C. MATHES

United States District Judge

[Endorsed]: Filed May 18, 1948. Edmund L. Smith, Clerk. [144]

In the District Court of the United States  
Southern District of California  
Central Division  
No. 7476-WM

AGNES F. SMITH,

Plaintiff,

vs.

HARRY C. WESTOVER, UNITED STATES  
COLLECTOR OF INTERNAL REVENUE,  
SIXTH DISTRICT OF CALIFORNIA, and  
UNITED STATES OF AMERICA,

Defendants.

### JUDGMENT

This cause having heretofore come before the court for hearing on the motion of plaintiff for summary judgment and the motion of defendants for summary judgment; and the motions having been heard and submitted for decision; and the court having heretofore entered its order on May 18, 1948, granting plaintiff's motion for summary judgment and denying defendants' motion for summary judgment:

It Is Hereby Ordered, Adjudged and Decreed that plaintiff do have and recover of and from the defendant, United States of America

(1) The sum of \$9,149.97 with respect to the tax year 1941 plus interest at the rate of six per cent per annum on the following amounts from the following

dates in accordance with the provisions of Section 177 of the [145] Judicial Code (28 U. S. C. A. Section 284): ~~and computed to the dates provided in said sections:~~ [Mathes, J.]

<u>Amounts</u>	<u>Interest from</u>
\$152.89	August 18, 1943
\$998.80	December 12, 1942
\$5,638.00	September 19, 1942
\$2,360.28	June 20, 1942

(2) The sum of \$19,927.20 with respect to the tax year 1943 plus interest at the rate of six per cent per annum on said amount from March 15, 1944, in accordance with the provisions of Section 177 of the Judicial Code (28 U. S. C. A. Section 284): ~~and computed to the dates provided in said section:~~ [Mathes, J.]

It Is Hereby Further Ordered, Adjudged and Decreed that plaintiff do have and recover of and from defendant, Harry C. Westover, the sum of \$9,038.45 with respect to the tax year 1943 plus interest at the rate of six per cent per annum on the following amounts from the following dates in accordance with the provisions of Section 177 of the Judicial Code (28 U. S. C. A. Section 284): ~~and computed to the dates provided in said section:~~ [Mathes, J.]

<u>Amounts</u>	<u>Interest from</u>
\$4,519.21	December 28, 1944
\$4,519.24	March 15, 1944

It Is Further Ordered, Adjudged and Decreed in accordance with Rule 54 (c) F. R. C. P., that Paragraph (a) of the prayer in plaintiff's complaint in this action be amended by striking therefrom the figures \$28,068.61 and inserting in lieu thereof the figures \$29,077.17, the latter figure being the correct figure [146] and being supported by the pleadings in this case.

Dated: May 28, 1948.

WM. C. MATHES

United States District Judge

The foregoing Judgment approved as to form: May 26, 1948. James M. Carter, United States Attorney; E. H. Mitchell and George M. Bryant, Assistant U. S. Attorneys; Eugene Harpole, Special Attorney Bureau of Internal Revenue; by George M. Bryant, Attorneys for Defendants.

Judgment entered May 28, 1948. Docketed May 28, 1948. C. O. Book 51, page 60. Edmund L. Smith, Clerk; by Louis J. Somers, Deputy.

[Endorsed]: Filed May 28, 1948. Edmund L. Smith, Clerk. [147]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice Is Hereby Given that Harry C. Westover, United States Collector of Internal Revenue, Sixth Collection District of California, and the United States of America, defendants herein, each hereby appeal to the Ninth Circuit Court of Appeals from the order denying defendants' motion for summary judgment and granting plaintiff's motion for summary judgment entered by this Court on May 18, 1948, and from the final judgment of this Court entered on May 28, 1948, in favor of the plaintiff and against both the defendants herein for the sum of \$37,107.96, plus interest.

Dated: July 13, 1948.

JAMES M. CARTER

United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Assistant United States

Attorneys

EUGENE HARPOLE,

Special Attorney

Bureau of Internal Revenue

By Eugene Harpole

Attorneys for Defendants

[Endorsed]: Filed & mld. copy to Gibson, Dunn & Crutcher Jul. 14, 1948. Edmund L. Smith, Clerk. [150]

[Title of District Court and Cause]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 152, inclusive, contain full, true and correct copies of Complaint to Recover Over-Payment of Federal Income Tax; Stipulation and Order For Extension of Time to Answer or Otherwise Plead; Answer to Plaintiff's Complaint; Stipulation and Order To Take Case Off Pre-Trial Hearing Calendar and to Set Case for Hearing on Motion for Summary Judgment; Order Extending Time; Notice of and Plaintiff's Motion for Summary Judgment with Affidavit, Exhibits and Points and Authorities in Support; Motion by Defendants to Take Off The Calendar Plaintiff's Motion for Summary Judgment and in the Alternative Counter-Motion by Defendants for Summary Judgment; Notice of Motion to Take Off Calendar etc.; Plaintiff's Memorandum of Reasons, Points and Authorities in Opposition to Defendants' Motion to Take Off Calendar Plaintiff's Motion for Summary Judgment; Written Statement of Reasons in Opposition to Plaintiff's Motion for Summary Judgment and Memorandum of Points and Authorities Answering Such Motion by Plaintiff and Also Supporting Countermotion by Defendants for Summary Judgment; Plaintiff's Reply Memorandum Concerning Her Motion for Summary Judgment; Plaintiff's Memorandum Concerning Question of Whether or Not Plaintiff Stands in the Shoes of her Corporation, the

Quick-Work Company, for the Purpose of Computing the Income Tax Resulting to her from the Liquidation of said Company; Order Denying Defendants' Motion to Take Plaintiff's Motion for Summary Judgment Off Calendar; Stipulation and Order re Briefs; Supplemental Brief for Defendants; Brief in Reply to Defendant's Supplemental Brief; Order on Motion for Summary Judgment; Judgment; Certificate of Probable Cause; Notice of Entry of Judgment; Notice of Appeal and Designation of Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 9 day of August, A.D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

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[Endorsed]: No. 12019. United States Circuit Court of Appeals for the Ninth Circuit. Harry C. Westover, United States Collector of Internal Revenue, Sixth Collection District of California, and United States of America, Appellants, vs. Agnes F. Smith, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed August 12, 1948.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 12019

HARRY C. WESTOVER, Collector of Internal Revenue  
for the Sixth District of California, and UNITED  
STATES OF AMERICA,

Appellants,

vs.

AGNES F. SMITH,

Appellee.

APPELLANTS' STATEMENT OF POINTS TO BE  
RELIED UPON ON APPEAL

To: Agnes F. Smith and Gibson, Dunn & Crutcher, her  
attorneys:

You and Each of You will please take notice under the provisions of subsection (6) of Rule 19 of the Rules of Practice of the United States Circuit Court of Appeals for the Ninth Circuit that the Appellants intend to rely upon the following points in their appeal in the above entitled case:

1. The District Court erred in granting appellee's motion for a summary judgment and in awarding judgment in favor of the appellee and against these appellants in the amount of \$37,107.96, plus interest.
2. The District Court erred in denying appellants' motion for a summary judgment.
3. The District Court erred in finding, holding and concluding that the pleadings, motions and affidavits established that payments received by appellee during the calendar years 1941 and 1943 from the Whiting Corporation pursuant to a contract between the Quickwork Corporation and the Whiting Cor-

poration which contract was assigned to appellee in 1940, under a dissolution of the Quickwork Corporation and in liquidation of said corporation and in exchange for stock in the Quickwork Corporation owned by the appellee, appellee being the sole stockholder of Quickwork Corporation, constitute capital gains under Section 117, Internal Revenue Code, as contended by the appellee rather than ordinary income under Section 22(a), Internal Revenue Code, as contended by appellants.

4. The pleadings, motions and affidavits in the record in the District Court establish that said payments were ordinary income to appellee and that the Commissioner consequently correctly treated such payments as ordinary income in the tax years involved rather than the proceeds derived from the sale or exchange of capital assets.

Dated: This 11th day of August, 1948.

JAMES M. CARTER—E.H.

United States Attorney

E. H. MITCHELL—E.H.

Assistant United States Attorney

GEORGE M. BRYANT—E.H.

Assistant United States Attorney

EUGENE HARPOLE

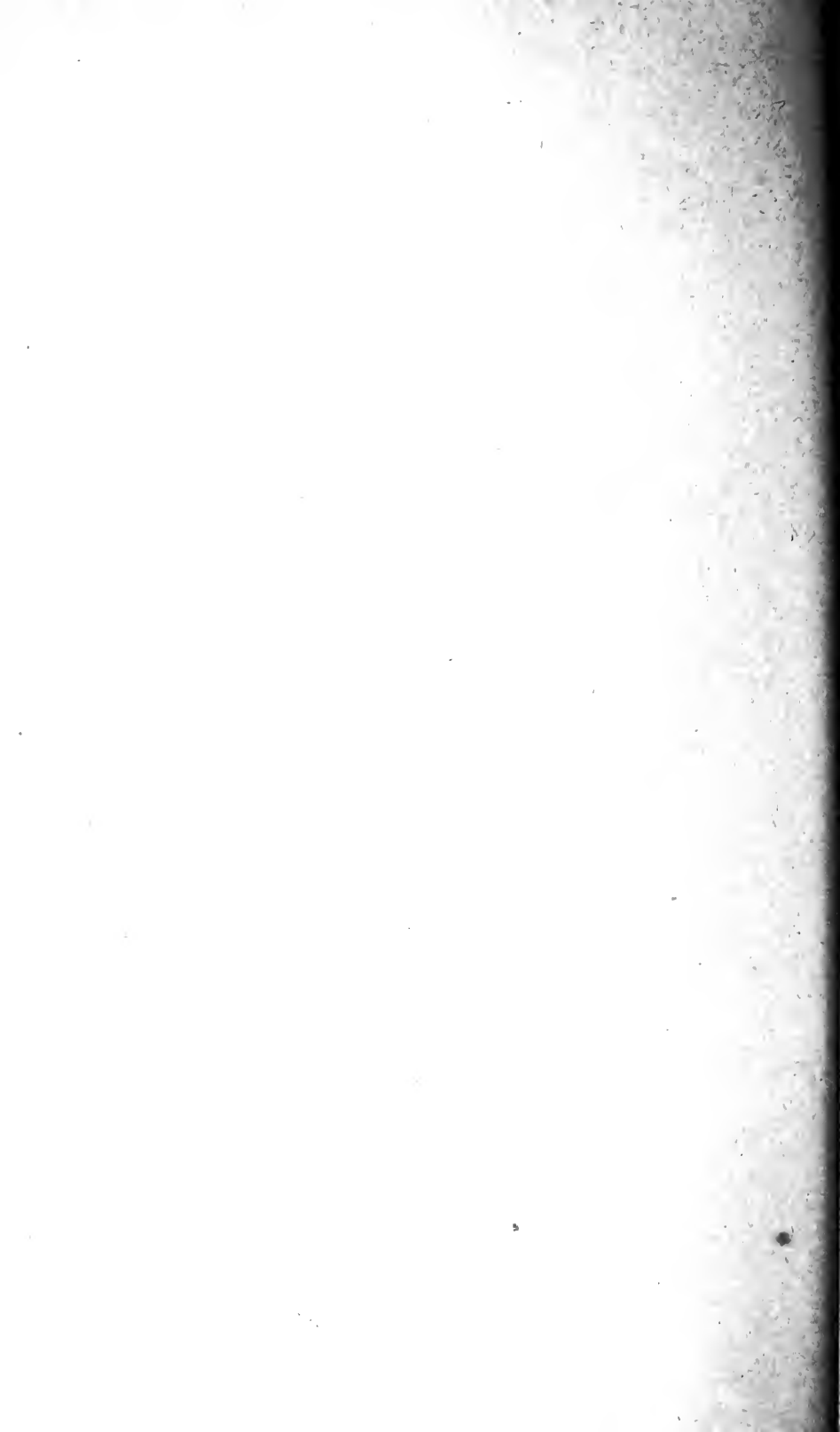
Special Attorney

Bureau of Internal Revenue

Attorneys for Appellants

Received copy of the within Appellants' Statement of Points to Be Relied Upon on Appeal this 11 day of August, 1948. By Bert A. Lewis, Attorneys for Appellee.

[Endorsed]: Filed Aug. 13, 1948. Paul P. O'Brien, Clerk.



No. 12019

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

HARRY C. WESTOVER, United States Collector of Internal  
Revenue, Sixth Collection District of California, and  
UNITED STATES OF AMERICA,

*Appellants,*

*vs.*

AGNES F. SMITH,

*Appellee.*

Appeal From the District Court of the United States  
for the Southern District of California,

---

## BRIEF FOR THE APPELLANTS.

---

THERON LAMAR CAUDLE,  
*Assistant Attorney General.*

ELLIS N. SLACK,  
ROBERT N. ANDERSON,  
HOMER R. MILLER,

*Special Assistants to the Attorney General.*

JAMES M. CARTER,  
*United States Attorney.*

GEORGE M. BRYANT,  
*Assistant United States Attorney.*

EDWARD H. MITCHELL,  
*Assistant United States Attorney.*

FILED

NOV 12 1948

PAUL P. O'BRIEN,



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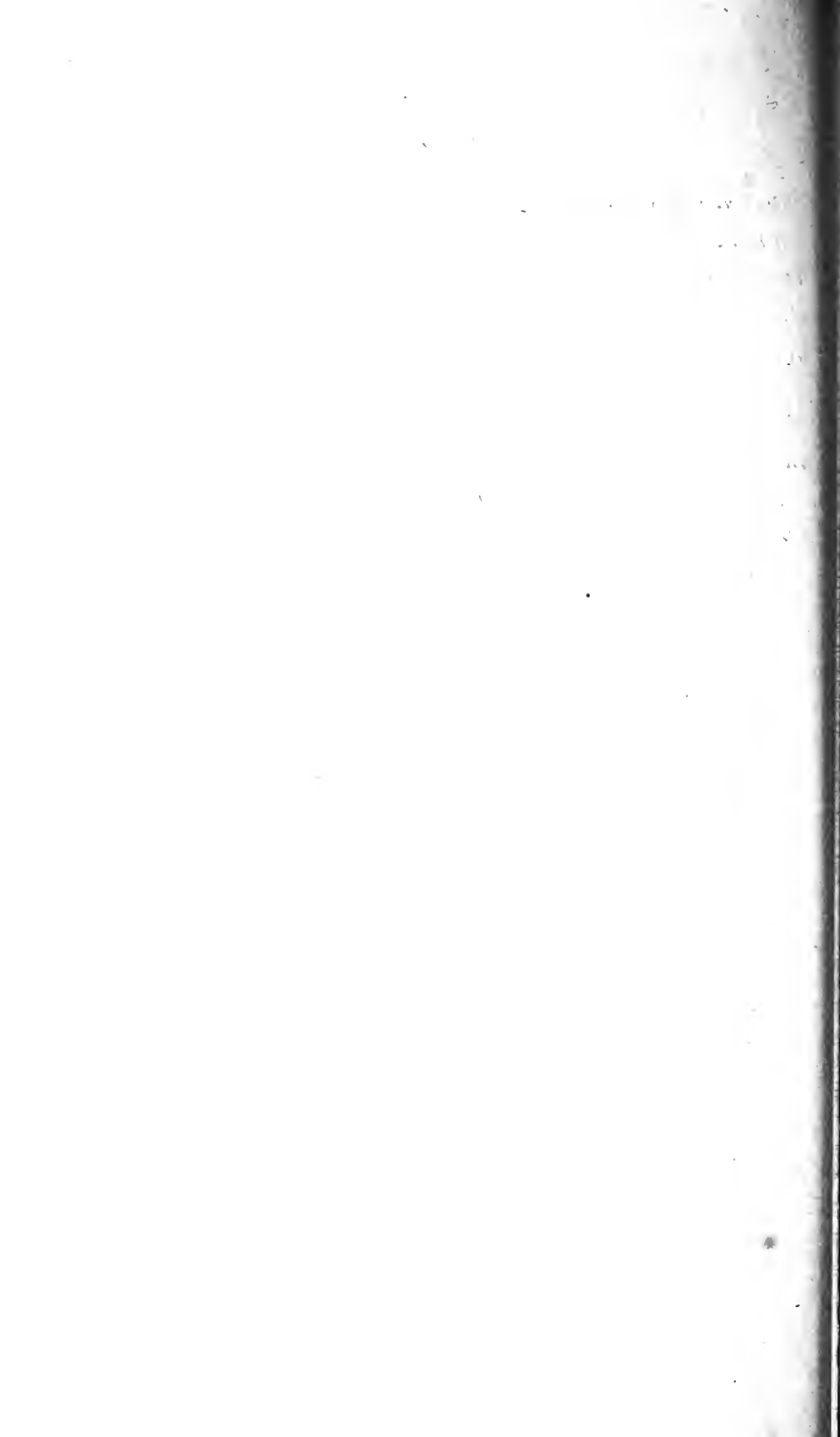
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No. 12019

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

HARRY C. WESTOVER, United States Collector of Internal  
Revenue, Sixth Collection District of California, and  
UNITED STATES OF AMERICA,

*Appellants,*

*vs.*

AGNES F. SMITH,

*Appellee.*

---

## BRIEF FOR THE APPELLANTS.

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### Opinion Below.

The District Court wrote no opinion.

### Jurisdiction.

This is an appeal from a judgment in favor of the taxpayer for the refund of income taxes for the years 1941 and 1943, in the amount of \$38,115.62, plus interest. Within the time allowed by law a claim for refund for 1941 was filed with the Collector of Internal Revenue for the Tenth District of Ohio [R. 7], and a claim for 1943 was also filed within time with the appellant Collector [R. 10]. The Commissioner notified taxpayer by registered mail of the disallowance of these claims on June 11, 1947 [R. 8], and June 10, 1947 [R. 10], respectively.

This action was commenced in the District Court on August 11, 1947 [R. 28], within two years after the Commissioner's notice of disallowance of both claims, in conformity with the provisions of Section 3772(a)(2), Internal Revenue Code.

The taxes for 1941 were paid to the Ohio Collector who has been out of office since January 1, 1944 [R. 6-7]. The taxes for 1943 were in part paid to the Ohio Collector [R. 9], and in part to the appellant Collector, the latter being in office on the date of this suit [R. 11].

The District Court had jurisdiction under Section 24, Twentieth, of the Judicial Code even though the amount sued for exceeded \$10,000. Taxpayer filed a motion for summary judgment [R. 35] which was sustained by the District Court [R. 46-47]. Judgment of the District Court was entered May 28, 1948 [R. 48-50]. Notice of appeal was fixed within sixty days thereafter on July 14, 1948 [R. 51]. This Court has jurisdiction under the provisions of 28 U. S. C., Section 1291.

### **Question Presented.**

In 1940 Quickwork Company in its dissolution and liquidation transferred to taxpayer, its sole stockholder, in exchange for her stock in the corporation, all of its assets including assets of a determinable value and a contractual right to receive from the Whiting Corporation certain payments, the amount of which depended on certain gross sales thereafter made by Whiting. The fair market value of this right on the date of its receipt by taxpayer was not ascertainable though it was recognized to be of substantial value. The question presented is whether payments received by taxpayer from this right in subsequent

years, which were in excess of the adjusted basis of taxpayer's stock previously recovered, were taxable to her as ordinary income or constituted capital gains under Sections 115(c) and 117(a)(4), Internal Revenue Code.

### Statute and Regulations Involved.

The pertinent statute and Regulations are set forth in the Appendix, *infra*.

### Statement.

Taxpayer brought this action to recover income taxes for 1941 and 1943, in the sum of \$37,107.96, plus interest [R. 2-11]. The answer admitted most of the material allegations of the complaint aside from legal conclusions [R. 29-32]. The taxpayer filed a motion for summary judgment based on the facts as admitted by the pleadings or as supported by an affidavit as to the allegations which were denied [R. 35-41]. The Court granted taxpayer's motion for a summary judgment and entered judgment accordingly [R. 46-50].

The undisputed facts pertinent to this controversy as admitted by the pleadings or as set out in taxpayer's affidavit may be briefly summarized as follows:

The Quickwork Company was an Ohio corporation engaged in the manufacture and sale of certain machine tools consisting principally of various types of rotary shears. It owned patents and drawings covering the manufacture of such machines and in addition to the manufacture and sale thereof had licensed other companies to manufacture similar machines on a royalty basis. In 1933, taxpayer acquired all of Quickwork's outstanding stock which she continued to own up to the date of the liquidation of the corporation in 1940 [R. 2-3].

On May 31, 1940, Quickwork entered into an agreement with Whiting Corporation for the sale to the latter of all of its assets, exclusive of cash and miscellaneous items. The agreement provided that Whiting should pay in consideration for the assets \$15,000 in cash, certain fixed amounts of a minor nature and 10% of the gross sales price to Whiting on all machinery and equipment thereafter developed and manufactured by it as a result of acquiring the machinery, patents and patterns of Quickwork. The obligation to make these payments on a percentage basis was to continue in any event until May 31, 1950, and thereafter during the lifetime of taxpayer, who was 57 years of age on the date of the agreement [R. 3].

For many years the annual sales of Quickwork had been substantial and both parties realized that the impending war would be likely to increase considerably the demand for and sales of the Quickwork line [R. 36-37]. While the parties realized the agreement to pay the 10% based on gross sales had a substantial value, there was no way of ascertaining the measure of the value at the time of the sale "and said agreement then had no ascertainable fair market value" [R. 4].

Shortly after May 31, 1940, pursuant to the contract, Quickwork transferred and delivered by bill of sale to Whiting complete title to the assets described in the agreement and thereupon ceased to have any interest in such assets. Shortly thereafter, Quickwork decided to liquidate and dissolve. Under date of August 24, 1940, it transferred to taxpayer by a bill of sale and assignment all of its assets of whatsoever nature including its rights against Whiting under the agreement of May 31, 1940, in complete liquidation and cancellation of all of its outstanding stock which was then owned solely by taxpayer who surrendered her stock for cancellation and retirement, after

which it was cancelled and retired without later being re-issued. In due course thereafter, Quickwork was dissolved [R. 4-5].

The adjusted basis of taxpayer's stock on the date of liquidation was \$34,000. She received in final liquidation assets of the total value of \$39,204.26, exclusive of the right to the percentage payments under the agreement between Quickwork and Whiting. At the time of its receipt by taxpayer, the contractual right had a very substantial value. However, there was no way of ascertaining the measure of the value and therefore it had no ascertainable fair market value. Because of this no value was assigned to it in determining the amount of taxpayer's capital gain upon said liquidation [R. 5].

In 1941, taxpayer received as percentage payments from Whiting under the contract \$37,231.68, which she reported in her federal income tax return for that year as ordinary income and paid a tax thereon [R. 6]. In 1943, she received further percentage payments under the contract in the sum of \$65,412.64, which she likewise reported as ordinary income and paid a tax thereon [R. 8]. Taxpayer alleges her treatment of these items as ordinary income was erroneous and that they represented capital gains realized by taxpayer on the exchange of her stock in Quickwork in complete liquidation of that company [R. 7, 9-10].

### **Statement of Point to Be Urged.**

The District Court erred in sustaining taxpayer's motion for summary judgment and in finding and holding that the amounts received in 1941 and 1943, on the assigned contractual right, were amounts received in complete liquidation of Quickwork and that they should be treated as capital gains rather than ordinary income.

### Summary of Argument.

The assets distributed to taxpayer under the complete liquidation of Quickwork are treated under Section 115(c), Internal Revenue Code, as being received in full exchange for her stock. These assets here consisted of money and property of fixed value plus a contractual right of substantial but unascertainable value.

The gain on the exchange (which is a capital gain under Section 117(a)(4), Internal Revenue Code) is measured under Section 111(a)(b) and Section 115(c), Internal Revenue Code, by the difference between the value of the money and property received and the adjusted basis of taxpayer's stock.

Taxpayer's capital gain on the transaction was realized in 1940, the money and the property being in excess of the adjusted basis of her stock without considering the contractual right. Since it was impossible to value the contractual right its value was correctly reported as zero and taxpayer realized capital gain to the extent of the value of the property received above the basis of the stock. The sums received in later years were not received in exchange for taxpayer's stock but were derived from the contractual obligation and not being received from the sale or exchange of capital assets they constituted ordinary income rather than capital gains.

The decision of the court below was therefore incorrect in treating the amounts received under the contract as being amounts distributed in complete liquidation and thus capital gains. They were ordinary income derived from the contract regardless of the value or lack of value of the contract when received.

## ARGUMENT.

### **The Income Received From the Contracts in 1941 and 1943 Did Not Arise From the Sale or Exchange of Capital Assets and Therefore Constituted Ordinary Income and Not Capital Gains.**

In August, 1940, taxpayer, the sole owner of the stock of Quickwork Company, received all of the assets of that company in complete liquidation in exchange for her stock. The adjusted basis of her stock was \$34,000, and the cash and assets that could be valued at the time were worth \$39,204.26. Besides these assets taxpayer received absolutely a contractual right under a contract entered into between Quickwork and the Whiting Corporation on May 31, 1940, whereby she became entitled to receive 10% of Whiting's gross sales prices less certain taxes and commissions on all machinery or equipment (with some exceptions) thereafter sold by Whiting and which were developed and manufactured by Whiting or upon its order as a result of the acquisition of various articles referred to in the contract [R. 16]. Both Whiting and Quickwork recognized the contractual right as having a substantial value [R. 4]. This was also recognized by taxpayer on the date of its distribution to her by Quickwork [R. 5]. However, there were no means of ascertaining its fair market value at that time and consequently in her income tax return for 1940, taxpayer assigned it no value in determining the capital gain on the liquidation and reported capital gain of only \$5,204.26.

In 1941 and 1943, taxpayer received from Whiting payments pursuant to this contractual right in the respective amounts of \$37,231.68 and \$65,412.64 [R. 6, 8]. The controversy here is over whether these payments are ordinary income under Section 22(a), Internal Revenue Code

(Appendix, *infra*), and reportable in full or capital gains so that taxpayer may take into account only the percentages set forth in Section 117(b), Internal Revenue Code (Appendix, *infra*).

It is our position that the sums are not capital gains because taxpayer did not receive them as property distributed in liquidation of Quickwork in exchange for her stock and consequently they did not arise from the sale or exchange of capital assets. She did not receive the payments from or through Quickwork but from Whiting under the contractual right which had been previously received by taxpayer in liquidation of her corporation. Taxpayer here is not entitled to treat the payments as capital gains in 1941 and 1943, because they were not in fact capital gains from the *sale* or *exchange* of a capital asset as defined in Section 117(a)(1)(4), Internal Revenue Code (Appendix, *infra*), but were ordinary income arising from a contract. The contractual right had not been sold or exchanged. In considering this problem we mention briefly several legal principles involved which are well settled and not in serious dispute between the parties:

1. The term "capital gains" is expressly made to apply only to gains from the *sale* or *exchange* of capital assets. Section 117(a)(4); *Helvering v. Flaccus Leather Co.*, 313 U. S. 247; *Fairbanks v. United States*, 306 U. S. 436; *Kieselbach v. Commissioner*, 317 U. S. 399; *Hale v. Helvering*, 85 F. 2d 819 (App. D. C.). Where it does not arise from the sale or exchange of a capital asset gain must be reported as ordinary income. *Fairbanks v. United States*, *supra*.

2. Under Section 115(c), Internal Revenue Code (Appendix, *infra*), taxpayer is entitled to treat a distribution in complete liquidation as property received in full ex-

change for her stock, and is entitled to apply the capital gains provisions in determining gain or loss on her stock on the theory there has been an exchange of her stock for assets. *Helvering v. Weaver Co.*, 305 U. S. 293; *White v. United States*, 305 U. S. 281.

3. Under Section 115(c), gain on a complete liquidation is determined under Section 111, Internal Revenue Code (Appendix, *infra*), and recognized to the extent provided under Section 112, Internal Revenue Code (Appendix, *infra*). It is conceded that none of the exceptions in Section 112 are here applicable so that the entire gain must be recognized subject to Section 117(b). Under Section 111 (a) and (b), Internal Revenue Code (Appendix, *infra*), the amount of gain realized is the sum of money received plus the fair market value of *property* other than money received, less the adjusted basis of the stock. It is not disputed that the sums received were in excess of the basis of the stock and constituted taxable income.

The problem here seems to hinge on whether the payments involved were in fact property or money received as a distribution in exchange for taxpayer's stock as defined in Section 111(b), or were derived from property so received.

The lower court held that the payments of \$37,231.68 and \$65,412.64 were amounts received in exchange for the stock. In reaching its decision the court relied strongly on *Carter v. Commissioner*, 9 T. C. 364, (pending on appeal in the Court of Appeals for Second Circuit).<sup>1</sup> The facts in that case are so similar to those here involved that the cases are probably indistinguishable. However, we

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<sup>1</sup>That case has been argued on appeal but was undecided at the time of writing this brief.

contend that the decision is incorrect and that the Tax Court erred in its view that the decision in *Burnet v. Logan*, 283 U. S. 404, required that the payments there involved must be treated as part payment in exchange for the stock.

In the *Logan* case, *supra*, the taxpayer sold her stock for cash plus a contractual right given her by the purchaser to receive unascertainable amounts payable annually based on future production of iron ore. The Court held that the future royalties did not constitute taxable income in the years actually received because taxpayer had not yet recovered her capital investment in the stock and in determining whether the basis had been recovered refused to value the contractual right because of its speculative value. The Court took the position that this sale was not a closed transaction in the year title to the stock passed because of the contingent payments to be received in the future.

Some of the distinguishing features between that case and the case at bar are:

1. The transaction there involved was a sale rather than an exchange as here involved. This was emphasized by the Court in its opinion (p. 412).
2. In the case at bar taxpayer had recovered the basis of her stock in 1940 prior to the tax years involved while there the basis had not been recovered in the tax years and it was held no taxable income arose until such recovery took place.
3. There the future payments were due and owing from the purchaser under a promisor-promisee relationship. Here there is no such relationship, taxpayer having received the right in exchange for her stock, which right was clearly a property right enforceable against another

company effective from the date of its assignment and one which taxpayer could enforce without reference to Quickwork.

4. In the *Logan* case, *supra*, there were grounds for considering the transaction still open, which grounds do not exist in the instant litigation. The purchaser there was required to make contingent payments over future periods pursuant to the contract. Here, Quickwork Company, in exchange for an absolute transfer of the stock, assigned unconditionally all of its assets including the contractual right and immediately thereafter dissolved. It had no further interest or connection with the contractual right and as between Quickwork and taxpayer the transaction was fully and completely closed.

5. The *Logan* case did not involve the provisions of Section 117 (a) and (b), Internal Revenue Code, or similar provisions of Revenue Acts. The Court there did not construe the capital gains provisions of the statutes, and its holding is not inconsistent with treating the contractual right as property under Section 111(b). It was not a question there of whether the sums involved were capital gains or ordinary income, but the question was whether they constituted taxable income at all. The Court held they did not because the capital investment had not been recovered.

We submit that the *Logan* case is readily distinguishable from the case at bar. There is nothing in the Court's opinion to suggest that the income here realized in later years should be related back to the sale or exchange and valued at its face amount in determining the gain. Section 111(b) clearly requires that the property shall be valued according to its fair market value when received. Further, Section 115(c) treats amounts distributed in complete

liquidation of a corporation as being in full payment in exchange for the stock.<sup>2</sup>

Taxpayer argues in effect that since the value of the contract could not be ascertained, she is entitled to treat the payments as in lieu of the "amount realized" as defined in Section 111(b). She contends that the payments may be treated as capital gains in 1941 and 1943, whereas the gain from her exchange of stock is clearly under the applicable law recognizable on the date the transaction was completed, that is when the exchange was fully carried out which we submit was in 1940. We believe there is no warrant here for extending the provisions of the statutes beyond the clear import of the language used. *Gould v. Gould*, 245 U. S. 151; *United States v. Merriam*, 263 U. S. 179. The exchange here was complete in 1940, and any gain on the stock was realized in that year.

In the *Logan* case, *supra*, the Court stated (p. 412), "The 1916 transaction was a sale of stock—not an exchange of property." This statement indicates that a different conclusion might have been reached if there had been an exchange of stock under a complete liquidation of a corporation, the corporation distributing all of its assets including a contract to that taxpayer as was the situation here. We have shown that the Court there did not construe Section 111(b), Internal Revenue Code, or

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<sup>2</sup>It has been stated that the doctrine of the *Logan* case should be applied sparingly in order to accelerate the taxation of income rather than defer recognition of taxable gains. 1 Mertens, Law of Federal Income Taxation, Sec. 5.07. See for example, *Brown v. Commissioners*, 26 B. T. A. 781, affirmed, 69 F. 2d 863 (C. C. A. 5th), certiorari denied, 293 U. S. 579, holding that where a taxpayer entered into a contract for the cutting of timber owned by her she was not entitled to recover her full investment on the value of the entire timber contract before reporting her liability for income tax on the profits derived from the timber cut and sold.

similar provisions of Revenue Acts providing that in determining gain in a sale or other disposition of property except an installment sale under Section 111(d), the amount realized shall be the sum of money received "plus the fair market value of the property (other than money) received." We therefore submit that the *Logan* case is not authority supporting taxpayer's position.

It is clear that the contractual right here involved constituted "property" received by the taxpayer under the provisions of Section 111(b). The term when as here used broadly in the statute clearly includes obligations, rights and other intangibles as well as physical property. *Citizens State Bank of Barstow, Tex., v. Vidal*, 114 F. 2d 380 (C. C. A. 10th). The term "property" when so used extends to everything of value including easements, franchises, improvements and incorporeal hereditaments. *Hoyd v. Citizens Bank of Albany Co.*, 89 F. 2d 105 (C. C. A. 6th). It has been stated that the term "property" includes anything which has an exchangeable value or goods to make up a man's worth including any interest or estate which the law recognizes as of sufficient value for judicial recognition. *Samet v. Farmers' & Merchants' Nat. Bank*, 247 Fed. 669 (C. C. A. 4th). It is well settled that it covers intangibles as well as tangibles. *Levy v. Commissioner*, 131 F. 2d 544 (C. C. A. 2d); *Tri-Lakes S. S. Co. v. Commissioner*, 146 F. 2d 970 (C. C. A. 6th); *City and County of San Francisco v. United States*, 106 F. 2d 569 (C. C. A. 9th).

It is clear that the taxpayer here received as "property" under Section 111(b), a contractual right which she did not sell or exchange, but continued to hold receiving payments therefrom which did not arise from

a sale or exchange of such right but as income from the investment. Such payments were ordinary income rather than capital gains. (*Puelicher v. Commissioner*, 6 T. C. 300; *Kieselbach v. Commissioner*, 317 U. S. 399.)

The principles above stated are well illustrated by the *Kieselbach* case, *supra*. There the City of New York obtained title to that taxpayer's property under a condemnation proceeding. Several years later the Supreme Court of New York entered a decree fixing the value of the property under which the taxpayer was entitled to receive its fair market value on the date of condemnation plus interest from that date. The title to the property vested in the City of New York on the date of the condemnation but payment was not received until after the decree. The Court held that the principal sum represented proceeds from an involuntary sale of capital assets and should be treated as capital gains in so far as they exceeded the adjusted basis of the property. However, it held that the interest which was paid after title to the property had passed to the city constituted ordinary income as not being part of the sales price. Although it was argued that in common acceptance the interest received was in payment of the property sold, the Court refused to so construe it and held rather that it was a sum derived from a right which had already been acquired on account of the delay in payment which could not be treated as proceeds from the sale of a capital asset. Here, as there, the payments arose from a right which had already been acquired and not pursuant to a

sale or exchange.<sup>3</sup> It would apparently be conceded here that if the right could have been valued in any given amount when received, it would have been includible in reporting capital gain in 1940 and in that case no question would have arisen as to the payments being ordinary income. It is obvious that the fact that the right had no ascertainable fair market value at the date of acquisition cannot alter the provisions of the statute with respect to the computation of the capital gains from the exchange in that year. The only effect the value or lack of value of the property received has upon the computation of the capital gains is with respect to determining the size or extent of such gains at the time of the exchange.

Income is determinable as at the close of a tax year without regard to subsequent events not then predictable or foreseeable. (*Penn v. Robertson*, 115 F. 2d 167, 175 (C. C. A. 4th); *Moore v. Thomas*, 131 F. 2d 611 (C. C. A. 5th).) A taxpayer may not postpone the payment of taxes in order to ascertain the final outcome of the transaction out of which there arose a gain or loss. (*Blum v. Helvering*, 74 F. 2d 482 (App. D. C.).) As the court stated in *Boudreau v. Commissioner*, 134 F. 2d 360, 361 (C. C. A. 5th):

“Under the express provisions of the applicable statutes, when there is complete liquidation of a corporation, stockholders are accountable for the

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<sup>3</sup>See also *Esperson v. Commissioner*, 127 F. 2d 370 (C. C. A. 5th), holding that where a taxpayer under a conveyance of oil interests reserved an interest in the oil in place that the “in-oil” payments did not constitute capital gain from the sale of capital assets but were receipts from income producing operations. See also *Fleming v. Commissioner*, 153 F. 2d 361, 363 (C. C. A. 5th); *Boudreau v. Commissioner*, 134 F. 2d 360 (C. C. A. 5th).

difference between the cost basis of their stock and the fair market value of the property received in exchange for it.”

And in *Fleming v. Commissioner*, 153 F. 2d 361, 363 (C. C. A. 5th), the court stated—“The exchange is an income-realizing event, and the fair market value of the distributed assets must be determined.” There is nothing in the statutes or in the rationale in the case of *Burnet v. Logan*, 283 U. S. 404, which would permit the payments here in question to be treated as received under an exchange merely because the right from which they were derived was not susceptible of valuation at the time of its acquisition. If property received on an exchange had no fair market value then no taxable gain or deductible loss was realized. (*Mount v. Commissioner*, 48 F. 2d 550 (C. C. A. 2d); *Tsivoglou v. United States*, 27 F. 2d 564 (Mass.), affirmed, 31 F. 2d 706 (C. C. A. 1st).) It would follow that if part of the property only can be valued the gain is measured only by the value of that portion. The value or lack of value of the right certainly could not determine whether such right was received under an exchange.

The other cases relied upon by the Tax Court in *Carter v. Commissioner*, 9 T. C. 364, are readily distinguishable on their facts. In the cases of *Haynes v. United States*, 50 F. Supp. 238 (C. Cls.); *Nicholson v. Commissioner*, 3 T. C. 596; *Imperial Type Metal Co. v. Commissioner*, 106 F. 2d 302 (C. C. A. 3d); and *Commissioner v. Hopkinson*, 126 F. 2d 406 (C. C. A. 2d), the property involved was sold on the installment plan with the pur-

chase price to be discharged by future payments. It was held that payments of the purchase price collected in the future tax years were capital gains because they constituted gain from the sale or exchange of a capital asset. But the payments collected by the taxpayer here were, as we have already emphasized, not the result of a sale or exchange of a capital asset, but merely the collection of income stemming from property received on the exchange and were not even collected from a party to the exchange.

Taxpayer's position here is analogous to an argument that if the corporation's assets distributed to taxpayer had included bonds or real estate the interest and rent later collected should be related back to the exchange and treated as capital gains in years subsequent to the exchange. This is patently erroneous and as we have shown is contrary to Section 115(c), and in addition inconsistent with the purposes underlying the capital gain statutory scheme outlined by the court in the *Hopkinson* case *supra* (p. 410).<sup>4</sup> The *Logan* case *supra*, certainly does not require such treatment.

Finally we emphasize there is clearly no authority under the statutes for a deferment plainly inconsistent with the statutes in the recognition of a capital gain from an exchange such as here where title to the capital

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<sup>4</sup>As the court points out there, the enactment of statutes providing for the treatment of capital gains was a measure to furnish relief from high surtaxes occasioned by the enhancement in value of property over a number of years.

stock and assets exchanged therefor fully passed, until a later year when the full amount of the income to be derived from a contractual right received on such exchange had been recovered. Such a treatment would be inconsistent with the policy of the law which is designed to accelerate and not delay the reporting of income. It is, of course, proper to value the contract if that is possible. It is only in rare cases that such impossibility exists. (*Boudreau v. Commissioner*, 134 F. 2d 360, 361 (C. C. A. 5th).) The inability to value the contract favors the taxpayer in reducing his capital gain, but at the same time creates the disadvantage of a low basis for gain or loss on the property received if sold or exchanged in the future. Certainly the basis of the contract would be zero under a sale or exchange under the facts as admitted here. All this could have no possible effect on the treatment of the income from the contract any more than it could have on the treatment of rent, interest or dividends received on other property received under any sale or exchange.

In view of the foregoing there is no authority for taxpayer's valuing the contracts on the basis of the subsequent payments. The transaction was complete when titled passed in August, 1940. (*Cf. Bedell v. Commissioner*, 30 F. 2d 622, 624 (C. C. A. 2d); *Commissioner v. Union Pac. R. Co.*, 86 F. 2d 637 (C. C. A. 2d).) The subsequent payments were not proceeds of a sale or exchange but income taxable under Section 22(a) and not capital gains.

Conclusion.

The judgment should be reversed.

Respectfully submitted,

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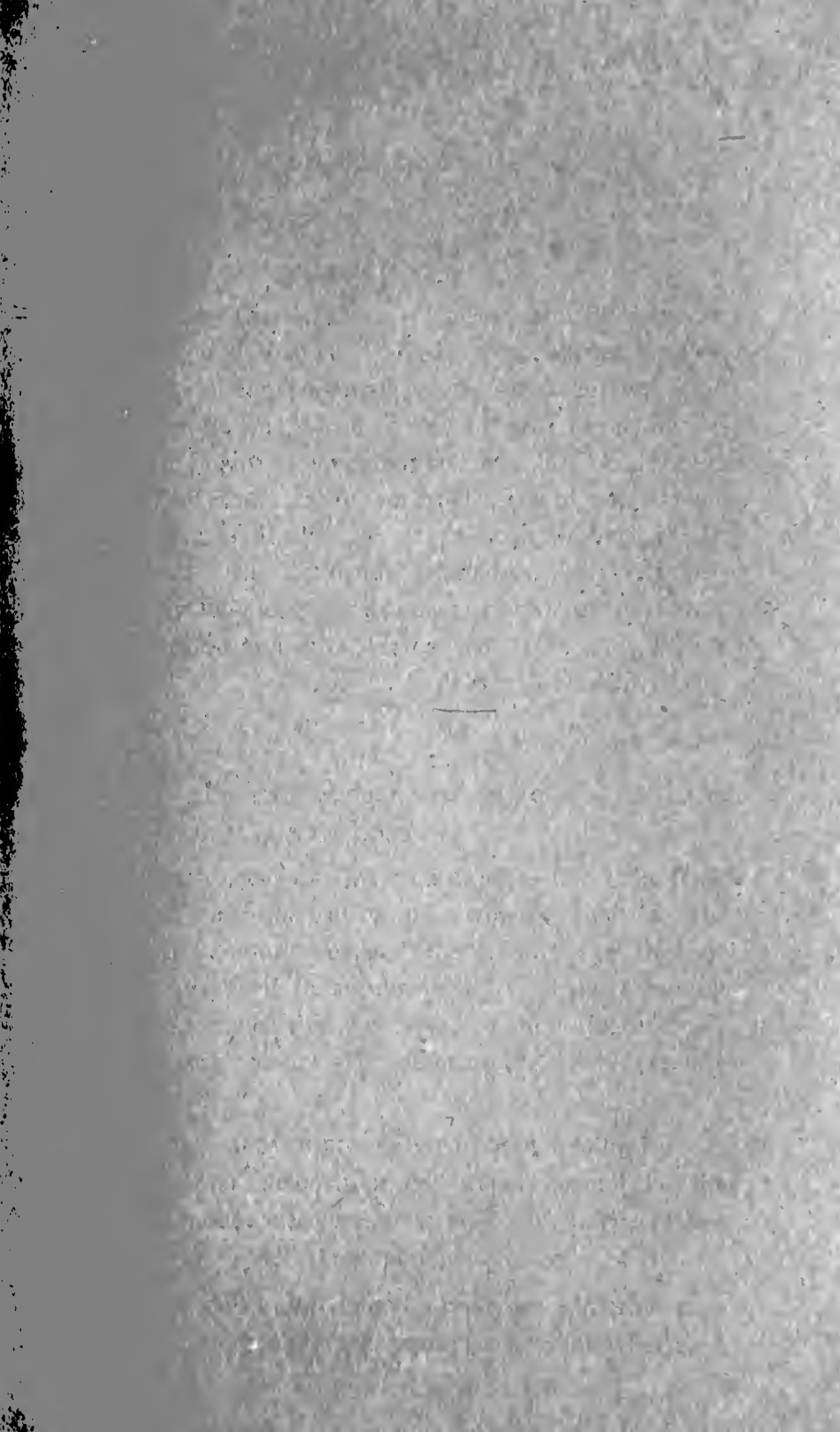
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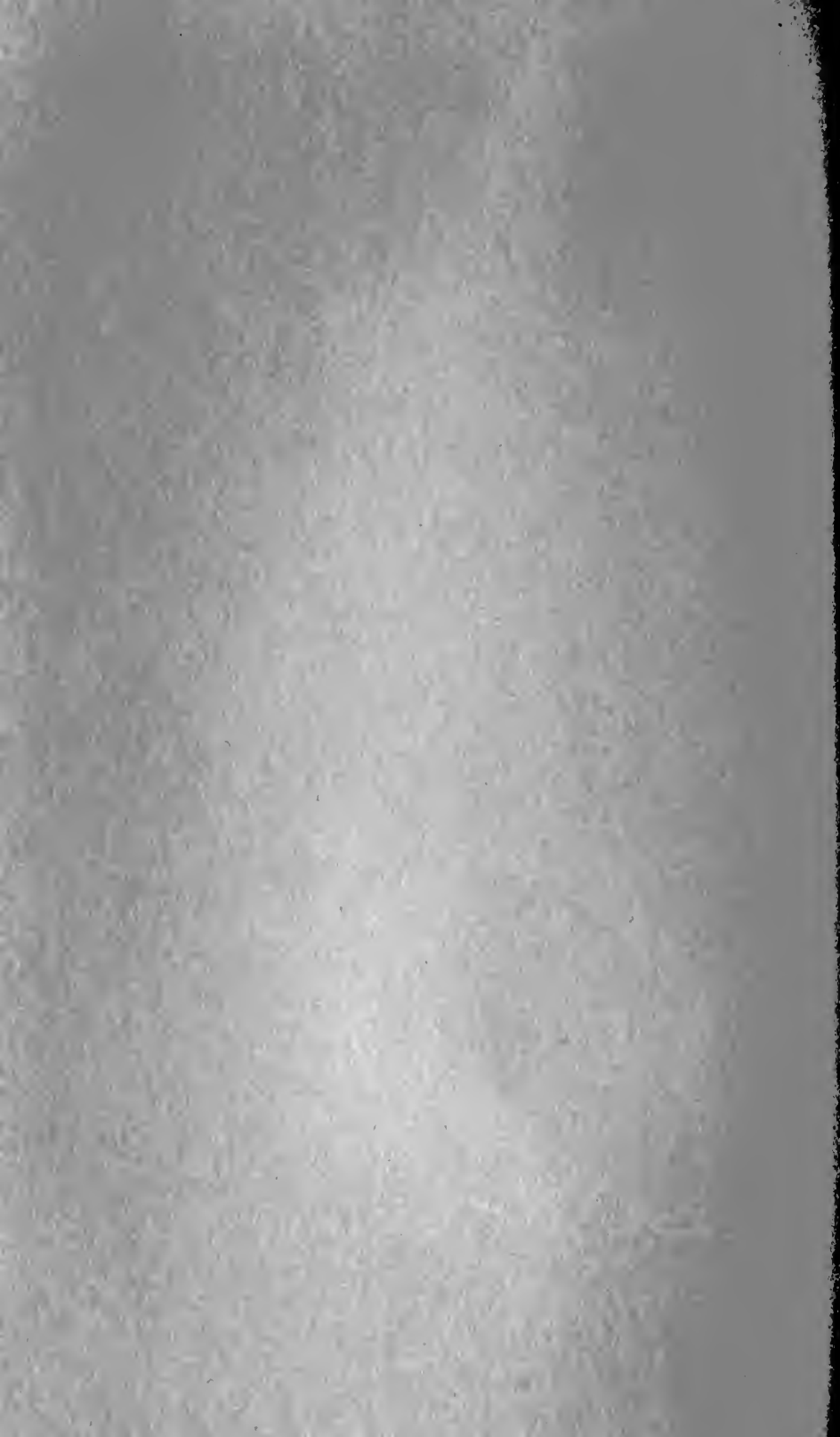
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November, 1948.







## APPENDIX.

### Internal Revenue Code:

#### SEC. 22. GROSS INCOME.

(a) GENERAL DEFINITION.—“Gross income” includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. \* \* \* (26 U. S. C. 946 ed., Sec. 22.)

\* \* \* \* \*

#### SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) COMPUTATION OF GAIN OR LOSS.—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) AMOUNT REALIZED.—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

(c) RECOGNITION OF GAIN OR LOSS.—In the case of a sale or exchange, the extent to which the gain

or loss determined under this section shall be recognized for the purposes of this chapter, shall be determined under the provisions of section 112.

(d) <sup>1</sup>INSTALLMENT SALES.—Nothing in this section shall be construed to prevent (in the case of property sold under contract providing for payment in installments) the taxation of that portion of any installment payment representing gain or profit in the year in which such payment is received. (26 U. S. C. 1946 ed., Sec. 111.)

\* \* \* \* \*

#### SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) GENERAL RULE.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section. (26 U. S. C. 1946 ed., Sec. 112.)

\* \* \* \* \*

#### SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(c) DISTRIBUTIONS IN LIQUIDATION.—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. \* \* \* (26 U. S. C. 1946 ed., Sec. 115.)

\* \* \* \* \*

## SEC. 117. CAPITAL GAINS AND LOSSES.

(a) DEFINITIONS.—As used in this chapter—

(1) CAPITAL ASSETS.—The term “capital assets” means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of which taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1);

\* \* \* \* \*

(4) LONG-TERM CAPITAL GAIN.—The term “long-term capital gain” means gain from the sale or exchange of a capital asset held for more than 18 months,<sup>5</sup> if and to the extent such gain is taken into account in computing net income;

\* \* \* \* \*

(b) PERCENTAGE TAKEN INTO ACCOUNT.—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net capital gain, net capital loss, and net income:

\* \* \* \* \*

(26 U. S. C. 1946 ed., Sec. 117.)

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<sup>5</sup>Section 150, Revenue Act of 1942, c. 619, 56 Stat. 798, changed this to “6 months.”

Treasury Regulations 103, promulgated under the Internal Revenue Code:<sup>6</sup>

SEC. 19.111-1. *Computation of Gain or Loss.*—Except as otherwise provided, the Internal Revenue Code regards as income or as loss sustained, the gain or loss realized from the conversion of property into cash, or from the exchange of property for other property differing materially either in kind or in extent. The amount realized from a sale or other disposition of property is the sum of any money received plus the fair market value of any property which is received. The fair market value of property is a question of fact, but only in rare and extraordinary cases will property be considered to have no fair market value. \* \* \*

\* \* \* \* \*

SEC. 19.115.5. *Distribution in liquidation.*—(a) *General.*—Amounts distributed in complete liquidation of a corporation are to be treated as in full payment in exchange for the stock and the amounts distributed in partial liquidation are to be treated as in part or full payment in exchange for the stock so canceled or redeemed. The gain or loss to a shareholder from a distribution in liquidation is to be determined, as provided in section 111 and section 29.111-1, by comparing the amount of the distribution with the cost or other basis of the stock provided in section 113; but the gain or loss will be recognized only to the extent provided in section 112.

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<sup>6</sup>Similar provisions appear in the corresponding Treasury Regulations 111, promulgated under the Internal Revenue Code, Sections 29.111-1 and 29.115-5 governing the year 1943.

No. 12019

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

HARRY C. WESTOVER, United States Collector of Internal  
Revenue, Sixth Collection District of California, and  
UNITED STATES OF AMERICA,

*Appellants,*

*vs.*

AGNES F. SMITH,

*Appellee.*

---

## APPELLEE'S BRIEF.

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FILED

DEC 8 - 1948

PAUL P. O'BRIEN,



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*Appellants,*

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*Appellee.*

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## APPELLEE'S BRIEF.

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### Jurisdiction.

Plaintiff filed claims for refunds of alleged overpayments by her of 1941-1943 Federal income taxes within the period prescribed by law [R. 7, 10]. The Commissioner notified plaintiff by registered mail of the disallowance of these claims on June 11, 1947 [R. 8] and June 10, 1947 [R. 10] respectively. Plaintiff commenced this action in the District Court on August 11, 1947 [R. 28] within two years after the Commissioner's notice of disallowance of both claims in conformity with Section 3772 (a) (2) of the Internal Revenue Code.

The entire alleged overpayment of 1941 taxes was paid to the Collector of Internal Revenue for the Tenth

District of Ohio [R. 6]. A part of the alleged overpayment for the year 1943 was made to said Collector [R. 9] and the balance was paid to appellant Collector who is the Collector of the Sixth District of California [R. 11]. Frazier Reams was the Collector of the Tenth District of Ohio at the time of all of said payments to that District and he has been out of office since January 1, 1944 [R. 9]. Therefore, even though the amount involved with respect to said payments to that District exceeded \$10,000, the United States of America was the proper party defendant under Section 24 (20) of the Judicial Code.

Plaintiff filed a motion for summary judgment [R. 35] which was granted by the District Court [R. 46-47]. Judgment of the District Court was entered May 28, 1948 [R. 48-50]. Notice of appeal was filed within sixty days thereafter on July 14, 1948. This Court has jurisdiction of the case under the provisions of 28 U. S. C., Section 1291.

### Statement of the Case.

The statement of the case contained in Appellants' Brief from pages 3 to 5 thereof is accurate and fair. We should merely like to add to the facts therein stated, the following:

1. Neither in her Federal income tax return for 1940 nor in any other way at any time has the plaintiff represented or implied to anyone that the Whiting contract did not have a substantial value at the time of the liquidation of the Quickwork Company [R. 6].

2. The negotiation of the contract between the Whiting Corporation and the Quickwork Company was an arm's length deal involving no inter-related interests in which each party bargained for the best possible deal for himself. Plaintiff did not solicit nor receive any advice concerning the tax consequences to the Quickwork Company or herself of the various proposals made during said negotiations or the agreement as finally executed [R. 4, 36-37].

### Summary of Argument.

The judgment of the lower court, in holding that the amounts received by the plaintiff under the Whiting contract in 1941, 1942 and 1943 constituted capital gain to her from the exchange of her Quickwork stock, follows the many decided cases directly in point on the question at issue. There is none to the contrary.

The rule of the lower court and the cases cited by it [R. 46-47] is sound in principle, practical and equitable. It has been accepted as settled law for many years and the tax statute has been amended numerous times during that period and Congress has not seen fit to change it.

By contrast, the rule urged by appellants in their brief, completely unsupported by authority, is inequitable and unsound in principle (because it actually taxes real capital gain as ordinary income) and cannot be reconciled with the controlling statutes involved.

## ARGUMENT.

### I.

**The Judgment of the Lower Court Is in Accord With a Substantial Body of Case Law on the Point at Issue; There Is No Authority to the Contrary.**

When a taxpayer receives, in consideration for the sale or exchange of an asset, a contractual right calling for uncertain future payments depending upon future contingencies, that contractual right is considered as having no ascertainable fair market value, and the cases have uniformly held that the transaction is not "closed" upon the receipt of the contractual right but remains open as long as payments are made under the contract; the payments thus subsequently received are received in exchange for the original asset transferred. This authority originated with a unanimous Supreme Court decision in 1931 which has not subsequently been questioned by that body, and extends to Tax Court decisions decided within the past few months. But a year ago the Tax Court, in a decision reviewed by its entire membership without a single dissent, applied this rule to a gain realized upon the complete liquidation of a corporation where the facts from the standpoint of the Commissioner of Internal Revenue were far more favorable to him than are the facts in the instant case.

*Carter v. Commissioner*, 9 T. C. 364 (1947).

The *Carter* case was affirmed by the Second Circuit while this brief was being printed. The Second Circuit Opinion is contained in the Appendix to this brief.

In *Burnet v. Logan*, 283 U. S. 404, 51 Sup. Ct. 550, 75 L. Ed. 1143 (1931), taxpayer sold her stock in one company in exchange for certain cash and the premise of

the vendee to pay her so many cents a ton on ore thereafter mined from certain property in which the first named company had an interest. This occurred in 1916. During 1918, 1919 and 1920, the taxpayer received substantial payments under this contract, but by the end of that period the total amount she had received with respect to her original stock did not exceed its basis. The Commissioner treated the 1916 sale as a closed transaction, and purported to value the contract received in 1916 under a complicated discount formula; consistently, in the tax years involved in that case, 1918, 1919 and 1920, he attempted to tax as income a certain percentage of the total payments received by the taxpayer under the contract. The Supreme Court held that the Commissioner's method of treating the 1916 transaction as closed was erroneous, stating at pages 412, 413:

"The 1916 transaction was a sale of stock—not an exchange of property. We are not dealing with royalties or deductions from gross income because of depletion of mining property. Nor does the situation demand that an effort be made to place according to the best available data some approximate value upon the contract for future payments. This probably was necessary in order to assess the mother's estate. As annual payments on account of extracted ore come in they can be readily apportioned first as return of capital and later as profit. The liability for income tax ultimately can be fairly determined without resort to mere estimates, assumptions and speculation. When the profit, if any, is actually realized, the taxpayer will be required to respond. The con-

sideration for the sale was \$2,200.00 in cash, and the promise of future money payments wholly contingent upon facts and circumstances not possible to foretell with anything like fair certainty. The promise was in no proper sense equivalent to cash. It had no ascertainable fair market value. The transaction was not a closed one. Respondent might never recoup her capital investment from payments only conditionally promised. Prior to 1921 all receipts from the sale of her shares amounted to less than their value on March 1, 1913. She properly demanded the return of her capital investment before assessment of any taxable profit based on conjecture."

It will be noted from the above quotation that the Supreme Court repeatedly said that after the taxpayer had recouped her basis, there would then be a *profit* upon which she must pay a tax. Since the word "profit" rather than "income" was used, and since the "profit" would be realized only after the basis of the *asset originally sold* was recovered, the Supreme Court was undoubtedly referring to the profit on the sale of the original asset, as distinguished from the contingent contract.

It is true that the *Logan* case did not involve the capital gains provisions, and did not require a direct holding that the payments subsequently received on such a contingent contract should be considered for tax purposes to be received in exchange for the original assets surrendered. Yet, that is the obvious and necessary import of the *Logan* decision. Under the present applicable statute—and it has not been changed for years in this respect—the determina-

tion of gain or loss from the sale of an asset is controlled by Section 111 of the Internal Revenue Code (the section involved in the *Logan* rule cases) regardless of whether the asset is or is not a capital asset. And it must necessarily follow that if the original transaction is not “closed”—to use the Supreme Court’s language—the subsequent payments must relate to it. The Courts have unanimously so interpreted the *Logan* decision, and have repeatedly reiterated the Supreme Court’s view that a transaction may be either “open” or “closed” for tax purposes.

The *Logan* case has been applied in a uniform series of cases involving a sale of patent rights or similar property for a consideration based upon subsequent production or profits.

*Commissioner v. Hopkinson*, 126 F. 2d 406 (C. C. A. 2d 1942);

*U. S. v. Yerger*, 55 Fed. Supp. 521 (D. C. Penn. 1944);

*Haynes v. U. S.*, 50 Fed. Supp. 238 (Ct. Cl., 1943);

*Phillip W. McAbee*, 5 T. C. 1130 (1945), at 1151;

*Edward C. Myers*, 6 T. C. 258 (1946);

*Carl G. Dreymann*, 11 T. C. 153 (1948).

These cases hold that the subsequent payments received year after year constitute capital gain and are taxable as such if the asset originally sold was a capital asset and had been held for the required length of time at the time of sale. At pages 16 and 17 of Appellants’ Brief, an attempt is made to distinguish these cases and others which

amply support them in principal<sup>1</sup> with the bland statement that they involved sales on the installment plan "with the purchase price to be discharged by future payments." There is no such difference. For the purpose of the present issue the cases are identical with the instant case, neither of them constituting an "installment" sale, and all of them possessing the same installment—that is, periodic payment-characteristics.

None of the above cases involved a gain upon the surrender of corporate stock in complete liquidation of a corporation. However, it is conceded at pages 8 and 9 of Appellants' Brief that the Internal Revenue Code prevents any differentiation in tax treatment because of that fact. Section 115(c) thereof specifically provides that the amounts received from a corporation in complete liquidation of its stock shall be treated as in full payment in exchange for the stock, (thus entitling liquidations to capital gain and loss treatment) and the gain or loss to the stockholders so resulting shall be determined under Section 111. Section 111 is the section which controls

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<sup>1</sup>In view of the many cases directly in point on the question at issue, it is felt there is no need of lengthening this brief by the discussion of numerous analogous cases which have applied the *Logan* doctrine under all tax statutes subsequent to the *Logan* decision and down to the present time. Some of these cases are:

*Perry v. Commissioner*, 152 F. 2d 183 (C. C. A. 8th, 1945), the Court citing with approval at page 186 the following language of the Tax Court:

"The very fact," said the Court, "that the statute uses fair market value instead of mere 'value' indicates intent not to permit the inclusion in income of any contract merely because of intrinsic value."

*Hills Estate v. Maloney*, 58 Fed. Supp. 164 (Dist. Court N. J., 1944);

*Imperial Type Metal Company v. Commissioner*, 106 F. 2d 302 (C. C. A. 3rd, 1939);

*Cassatt v. Commissioner*, 137 F. 2d 745 (C. C. A. 3rd, 1943).

the taxation of all sales or dispositions of property, and it or its preceding counterpart was involved in all of the above cases. That is, the above cases held that if a contract is so contingent as to have no “ascertainable fair market value” under the rule of the *Logan* case, it does not have a “fair market value” under Section 111(b) and therefore the determination of the gain is left open until the contingent contract received is paid out. Clearly a gain upon a complete liquidation must be governed by the same rule since it is governed by the identical statutory provision.

It was so held in the recent unanimous case of *Susan J. Carter*, 9 T. C. 364 (1947) (affirmed by the Second Circuit; see Appendix to this brief.) In the *Carter* case Oil Trading Company, Inc. (hereinafter referred to as “the Corporation”) was a corporation engaged in the oil brokerage business. It would secure customers for various sellers of oil. The contracts for the sale of the oil frequently provided that the purchaser would buy an approximate amount of oil, or the entire production at a particular locality, for a certain period, or a certain number of tank cars of varying capacity. The Corporation’s contract with the seller entitled the Corporation to a commission of 1¢ per barrel on all oil delivered under the contract. In view of the uncertainty of the amount of oil under a particular contract, it could not be determined at the time of the execution of the contract just what the total commission would be.

In 1943 the Corporation liquidated and dissolved, and transferred all of its assets, including 29 brokerage contracts and 3 others of a similar nature—where the amount of the commission was subject to future contingencies of

the type above summarized—to the taxpayer, its sole stockholder, in exchange for her stock in the corporation. In the year 1943 the taxpayer received \$43,640.24 as commissions under these contracts. She reported this sum as capital gain realized upon the exchange of her stock in liquidation and the Commissioner claimed that it was ordinary income. This issue was determined in taxpayer's favor, and in view of the similarity between this case and the instant one, the reasoning of the Court on this issue is set forth hereinafter at length (9 T. C., 370):

“After examination of the authorities adduced, and many others, we are of the opinion that the collections upon the property just here involved (where no services are to be performed by the distributee) are (except as to minor amounts hereinafter examined) to be regarded as capital assets, and gain calculated at capital gain rates. In *Burnet v. Logan*, *supra*, the Supreme Court considered a situation where a sale of stock was made, payment to be made in proportion to ore mined, so that the market value of the agreement to pay could not be determined with fair certainty. The Court said that it was not necessary to place some approximate value on the contract for future payments, that, as payments on account of extracted ore come in, ‘they can be readily apportioned first as return of capital and later as *profit*. \* \* \* When the *profit*, if any, is actually realized, the taxpayer will be required to respond. \* \* \* The transaction was not a closed one. \* \* \* She properly demanded the return of her capital investment before assessment of any taxable *profit* based on conjecture.’ (Italics supplied.) Thus, it is clear that, if there is a sale (or exchange) in part in consideration of a contract without ascertainable fair market value, taxation is deferred until collection under such con-

tract, and tax will be upon the *profit* over cost basis, and not upon ordinary income. This is answer to respondent's idea that Susan J. Carter's recovery of her cost basis in the primary distribution distinguishes the *Logan* case. Profit on a capital transaction is not ordinary income; and, under section 115(c) of the Internal Revenue Code, there was exchange of stock in payment for the contracts distributed—a capital transaction. The respondent says it was a closed transaction. The *Logan* case says the transaction there 'was not a closed one.' Is there any reason, in the fact of exchange involved in liquidation rather than ordinary sale or exchange, to distinguish the *Logan* case from that here involved? We can find none. Both are sales, or exchanges, of capital assets (stock) for contracts of no ascertainable value. Section 115(c), in our view, requires us to make no distinction. The *Logan* case speaks of *profit*, not ordinary income, after recovery of basis, and the transaction here is no more required to be treated closed than in that case. Nothing in the nature of liquidation distribution is seen to require an immediate closing, more than in an ordinary exchange, and the language of section 115(c) provides no exception, in case of distribution of unascertainable values, from its mandate to regard the distribution as received in payment in exchange for the stock—and it immediately thereafter treats of 'gain or loss to the distributee resulting from such exchange.' We think that such a distributee, after realization on the contracts of more than cost basis, had gain requiring treatment under section 117.

*Bessie B. Hopkinson*, 42 B. T. A. 580; *affd.*, 126 Fed. (2d) 406, is, in effect, the same as the *Logan* case, upon which it in part relies. There, a patentee conveyed his patent rights in consideration of an

agreement to make payments based upon manufacturing done under the patent rights. After receiving under the contracts amounts exceeding his cost or other basis, the patentee placed the contracts in trust for his wife, the petitioner in the case. The question at issue was whether payments thereafter received by the beneficiary were ordinary income or capital gain. We held that they were capital gain, saying that, 'In contemplation of law, every payment \* \* \* was, \* \* \* part of the purchase price of a sale of capital assets.' It will be noted that the cost basis had been recovered, as here. In *Haynes v. United States*, 50 Fed. Supp. 238, the Court of Claims held that one who sold capital stock for cash, plus a promise to pay according to the amount of oil and gas produced from the properties involved, was taxable upon such payments when received as profits from sale of capital assets, under section 117(a) of the Revenue Act of 1936, and not as current income. In *George James Nicholson*, 3 T. C. 596, the petitioner in 1931 sold corporate stock in consideration of cash, in excess of his cost basis, and 2 cents a gross ton of stone produced and shipped by the corporation. In later years he received payments under the contract. We held that they were taxable as capital gain, 'since, as we have seen, they are periodic payments for the property sold in 1931.' In *United States v. Yerger*, 55 Fed. Supp. 521, partnership assets were in 1913 transferred to a corporation in consideration of transfer to the partners of corporate stock and agreement to pay them a percentage of the corporate profits for 5 years. A partner assigned his interest in the profits to the defendant, who in 1936 received payments under the agreement. Citing the *Logan* and *Hopkinson* cases, the court held that, 'where there is a right to receive the consideration for capital assets in in-

stallments, or upon contingencies, the transaction is not a closed one. \* \* \* It has no ascertainable fair market value,' and that the defendant's share of corporate profits were payments upon the purchase price of capital assets, as distinguished from ordinary income. The court relied upon *Imperial Type Metal Co. v. Commissioner*, 106 Fed. (2d) 302, affirming 38 B. T. A. 1531, involving the same company and transaction, where it was held that the payments were capital expenditures upon purchase price for capital assets and not business expense deductible by the corporation.

The respondent attempts to distinguish the above cases, urging that petitioner did not sell or exchange the contracts; that is, did not sell or exchange capital assets. The distinction is, in our view, untenable. She did, under section 115(c), exchange capital assets—her stock. *Helvering v. Chester N. Weaver Co.*, 305 U. S. 293. Under the above authority, we hold that the petitioner's income from the contracts so far considered was taxable as capital gain."

The instant case is a stronger case from the taxpayer's standpoint than was the *Carter* case. In the latter the commissions under the contract would have been ordinary income if received by the corporation. However, they were transformed into capital gain as a result of the liquidation. In the instant case, the corporation itself—Quickwork—sold the assets with which produced its income, (plus a small inventory) which assets are ordinarily regarded in business and legal channels as "capital assets." It so happened that under the tax law applicable to the year 1941, the part of those assets constituting depreciable property, *i. e.* the patents, would not be considered as capital assets for tax purposes, although the

rest would be so considered. However, under the income tax law applicable to the year 1943, the gain from all of such assets would be treated as capital gain.

I. R. C., Section 117 (j);

*Snell v. Commissioner*, 97 F. 2d 891, (C. C. A. (5th) 1938);

*Harry B. Golden*, 47 B. T. A. 94 (1942).

Thus in the instant case, if Quickwork had continued to receive the Whiting payment, a large part of them would have constituted capital gain to it in 1941, and virtually all of them would have constituted capital gain to it in 1943. Her position is thus much stronger than that of the plaintiff in the *Carter* case.

The Second Circuit unanimously affirmed the *Carter* case while this brief was being printed. The entire opinion is contained in the Appendix to this brief.

As opposed to the above cases directly in point and unanimously supporting the judgment of the lower court, appellants have marshaled only four authorities worthy of mention. Two of these, *Boudreau v. Commissioner*, 134 F. 2d 360 (C. C. A. (1st) 1943), and *Fleming v. Commissioner*, 153 F. 2d 361 (C. C. A. (5th) 1946) (App. Br. pp. 15, 16, 18), both rejected a stockholders' claim that the gain upon the complete liquidation of his stock should not be considered a closed transaction because of the difficulty of valuing certain of the assets received. The *Boudreau* case involved an oil interest, which the trier of fact in the lower court had found to have an ascertainable fair market value and had actually valued at a specific figure. This

case has no bearing on the present one since here it is admitted that the contract involved had no ascertainable fair market value. The *Fleming* case involved the receipt in liquidation of a fee interest in land subject only to the interest of a lessee in an outstanding oil lease. Thus the stockholders had received the most absolute type of property interest, a fee interest in land. The difference between that sort of property and the unsecured contingent contractual right involved in the instant case and the *Logan* cases is obvious and need not be expounded. In any event, the appellants are apparently not relying upon the *Boudreau* and *Fleming* cases which required the valuation of the property when received; appellants' position apparently is not that the Whiting contract should have been valued at some figure by the plaintiff when received by her in 1940, but rather that since it had the uncertain qualities of a *Logan* contract and the basis of her Quickwork stock had been recovered, the Whiting contract must have been valued at zero in 1940.

If the Whiting contract had been considered by the parties in 1940 to be worthless, and it could have been properly valued at zero at that time and was so valued, then there would have been a closed transaction in 1940, the contract itself would then have acquired an independent basis of zero, and any subsequent payments thereon would be upon the contract rather than in exchange for the stock and thus would constitute ordinary income. However, in the instant case it is conceded that the contract had a very substantial value when received in 1940, but the amount of that value could not be determined. This being so, under the law the gain on the exchange of the stock remained open, and the contract did not acquire an independent basis of its own.

In the *Puelicher case*, (App. Br. p. 14) the taxpayer inherited a judgment against the bondholders committee—as such and not personally—of an insolvent water company. The judgment “had no fair market value at that time” (6 T. C. 301). At a later date she received certain payments on the judgment and claimed them as capital gain. Since neither she nor anyone else had sold or exchanged anything, the Court properly held that there could be no capital gain. That was the only point that case discussed or determined. It has no bearing on the instant case since here the taxpayer did sell or exchange something, namely, her stock in the Quickwork Company. Furthermore, it may well be that the Tax Court meant by its statement that the claim had no fair market value when inherited, that it was worthless. If so, the claim itself must have had an independent basis of zero to the taxpayer so that subsequent payments thereon must have been with respect to the claim rather than with respect to some earlier asset of the taxpayer. When property is inherited in an estate, there are strong practical reasons which require its being given a value at that time even though the value is rather speculative. The estate must be closed and inheritance taxes must be computed. As a matter of fact in the *Logan case* itself, the taxpayer had inherited a part of the contractual rights involved from her mother and that part had been valued in her mother’s estate; the Supreme Court recognized that this “probably was necessary in order to assess the mother’s estate.” Yet, when it was faced with an income tax problem where there was no pressing necessity of a value

based upon guesswork, it chose the more practical and fair solution of leaving the matter open until the actual payments were received on the contract.

Finally in appellants' fourth case. *Kieselbach, et al. v. Commissioner*, 317 U. S. 399, 63 Sup. Ct. 303, 87 L. Ed. 358 (1943), the taxpayer claimed that that part of a condemnation award actually consisting of interest at six per cent per annum on the value of the property, as determined at the time of taking, from the date of taking to the date of payment constituted capital gain. In that case the judgment involved actually determined how much was owing the taxpayer for his property—the value thereof at the time of taking—and how much was owing him for delay in paying for it. Obviously the latter was interest and must have been taxed as ordinary income. In contrast, in the instant case, there is nothing to indicate that the parties gave any consideration to the value to either of them of the fact that the payments were spread out over several years of time. The spreading out was a necessary result of the method the parties used in determining the purchase price. There was no thought of discount or interest. Be that as it may, the *Kieselbach* case did not tax the entire payment as ordinary income, but only the interest.

The above summary of the pertinent case law on the instant problem has thus demonstrated that there are numerous cases directly in point and that the holding of the lower court in the instant case is in conformity with all of them.

II.

**The Rule Adopted by the Judgment of the Lower Court Is Sound, Equitable and Practical.**

Long before we had an income tax law it had become common practice to measure the sales price of capital assets of an uncertain value—particularly patents—by a percentage of sales thereafter or profits from said sales. *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577 (1875). Since our income tax law requires the computation of income on an annual basis and differentiates between capital gain and ordinary income the proper treatment thereunder of the payments received under such a contract has posed a difficult problem for the Commissioner and the Courts. There are three possible solutions:

1. It could be required that all such contracts be valued at some figure at the time of receipt regardless of the margin of error in such determination; capital gain or loss would then be determined in that year based on that figure; the contract received would then acquire a basis of its own equal to the value then placed upon it, subsequent payments on the contract would be tax-free to the extent they did not exceed that basis, and the remainder would be ordinary income. (Such payments might be treated entirely as a return of capital until the basis of the contract was recovered after which they would be 100% income, or, in the alternative, a percentage of each payment could be allocated to capital and income.)

This was the method used by the Commissioner and condemned by the Supreme Court in the *Logan* case. The objections to it as there set forth are: (a) Tax liability is predicated upon guesswork—the uncertain value of the contract; (b) a taxpayer is required to pay a tax on a

gain which he never receives in dollars and, because of the contingent nature of the contract, may never receive, and (c) the taxpayer is required to pay when he has neither received the cash to make the tax payment nor any asset upon which he can realize, by loan or otherwise, with which to pay.

2. The appellants have developed a new suggested solution of the problem obviously calculated to avoid the barrier of the *Logan* decision. Their view is that the contract should be valued at zero (App. Br. pp. 16, 17 and 18), and that after the original basis of the stock transferred has been recouped, all subsequent payments on the contract must be reported as ordinary income. This view cannot be reconciled with the pertinent provisions of the Internal Revenue Code as will be pointed out hereinafter. But for the present, analyzing it only on principle with reference to the *general* pattern of our tax law, it is patently unsound because it taxes real capital gain as ordinary income. Let us assume, for example, that the Quickwork patents had been owned by the taxpayer, and two other taxpayers A and B, in equal interests as tenants in common, each interest being held at a basis of \$10,000; that the purchaser was willing to pay each of them \$100,000 cash for his interest, but each of them was demanding \$200,000 in cash therefor. Let us assume that the purchaser negotiated with each of them separately and finally agreed to pay A \$150,000 in cash, B \$150,000 in ten \$15,000 annual installments, and plaintiff taxpayer 2% of the gross sales of the Quickwork line over a ten-year period, which 2% happened to amount, as the facts developed, to \$15,000 a year for ten years. Appellants must concede that A could report his entire \$140,000 profit as capital gain, and B could include a proportionate part of

his \$140,000 profit in his income tax returns for the ten subsequent years, all of which would be taxed as capital gain. I. T. 1737, II-2 C. B. 44. Yet the appellants' rule would require the plaintiff taxpayer to treat her *entire* \$140,000 gain as ordinary income.

The important fact in the instant case is that the Whit-  
ing contract when received had a very substantial value and all of the parties recognized that it had such a value. Thus, the taxpayer's stock likewise possessed that value. There is no reason in principal or otherwise why, because of the difficulty in arriving at the true measure of that value, that the realization thereof must be taxed entirely as ordinary income. The situation is entirely different from that which would exist if the value were wholly speculative and probably non-existent. So in the hypothetical case above supposed, if taxpayer had accepted the offer of \$100,000 for her interest, she could have reported the gain as capital gain, but because she felt it was worth more and agreed on a method of valuation subject to future contingencies which vindicated her judgment, she would lose entirely the advantage of the capital gain provisions and be required to report as ordinary income, not only the \$50,000 in excess of the \$100,000 figure which everyone agreed was the minimum value, but also the \$90,000 gain based upon that minimum accepted value.

In view of these results, it is not surprising that no Court to date has adopted appellants' theory.

3. The final alternative solution of the problem is that adopted by the lower court, the *Logan* case and those following it: Hold the transaction open until the contingent contract is paid out and treat the payments on the contract as being received in exchange for the asset originally sold. Under this method the taxpayer's taxes are computed on

the basis of actualities rather than guess-work. And it has the practical advantage comparable to the installment sales method of requiring payment of taxes only after the taxpayer receives the funds with which to pay.

This solution has appeared to be the most sound to all of the Courts that have been faced with this problem. The only possible weakness in it is that it ignores the interest element, if any, in such a transaction which compensates the seller for his consenting to be paid for his capital asset over a number of years. But because of the character of the transactions in which contingent contracts are received in payment, it is usually evident that the parties have not given any consideration to this "interest" element. And there are numerous instances in the tax law where the Courts have refused to create or imply an interest element in order to treat as ordinary income a percentage of a lump sum capital payment. Thus, if property is sold upon an installment basis and there is no specific provision for interest on deferred installments, no interest payment will be implied and the entire payments will be considered as made in exchange for the property.

I. T. 2674, XII-1, C. B. 96;

*MacDonald v. Commissioner*, 76 F. 2d 513. (C. C. A. 2nd, 1935);

*Daniel Brothers Company v. Commissioner*, 28 F. 2d 761 (C. C. A. 5th, 1928);

*Henrietta Mills, Inc. v. Commissioner*, 52 F. 2d 931 (C. C. A. 4th, 1931).

Again if A sells property to B in consideration for B's promise to pay A a certain annuity for life, B must capitalize the entire amount of each annual payment and cannot deduct part of it as interest.

*Citizens National Bank of Kirkville v. Commissioner*, 122 F. 2d 1011 (C. C. A. 8th, 1941);

*Corbett Investment Company v. Helvering*, 75 F. 2d 525 (App. D. C., 1935);

*Steinbach Kresge Co. v. Sturgess*, 33 Fed. Supp. 897 (D. C. N. J., 1940).

Compare:

*John C. Moore Corp. v. Commissioner*, 42 F. 2d 186 (C. C. A. 2nd, 1930).

But even if we were to concede, contrary to the facts, that in the instant case the parties did have in mind this interest element the result would be that the lower court had taxed as capital gain not only the true capital gain but also the interest element. The appellants' cure for this slight weakness in the *Logan* rule is not merely to cure the defect but to compound the error by treating not only the interest element but the entire capital gain as ordinary income. It should be noted in this connection that the *Logan* case actually involved only an attempt to tax the "interest" element of the payment as determined by the Commissioner, and this attempt failed. Certainly our Supreme Court would not permit the taxing as an "interest element" of the entire payment.

It is submitted that, in view of the above, the solution reached by the lower court and the *Logan* cases to the instant problem is the best possible solution, and is far preferable to that suggested by the appellants.

III.

**The Rule Advanced by the Appellants Cannot Be Reconciled With the Statute, Whereas the Judgment of the Lower Court Is Consistent With It.**

Let us assume that A, who holds a capital asset at a basis of \$10,000, sells it to B for nothing except a contingent contract of the *Logan* type. In the subsequent year he receives \$10,000 on the contract and in the following year an additional \$10,000. Appellants did not carry their "zero basis" theory to its logical conclusion which would require that the first \$10,000 received be treated as ordinary income. They could not do so in the face of the *Logan* case, and therefore attempted to distinguish that case on the ground that there the taxpayer had not recovered her original basis at the time the Commissioner attempted to tax her on the transaction. (App. Br. p. 10.) If the appellants were asked why the first \$10,000 did not constitute ordinary income they would no doubt reply that it constituted a return of capital. If they were then asked "what capital?" they would no doubt reply "the capital invested in the asset sold." If they go this far they must admit that the first \$10,000 received is received in exchange for the original asset sold. If this be true, the last \$10,000 must likewise be treated as received in exchange for the original asset sold. So far as the law of contracts and the intention of the parties are concerned, every dollar received has the same character; that is, it is paid in exchange for the same consideration. So far as the purchaser is concerned, he would not even care about

the seller's basis, and would have no interest in reaching the point where the seller has recouped his basis. Obviously, in his mind, everything he pays is in exchange for the same thing.

This being so, it is impossible to reconcile the appellants' theory with the tax statute. Once the position is asserted that the contingent contract has a basis of zero, then it must logically follow under the statute that *all payments received* thereon thereafter, even before basis is recouped, constitute ordinary income.

Thus, we must remake the statute if we are to accept the appellants' theory. In contrast, the *Logan* rule as applied by the lower court ties perfectly into the language of Section 111(b). That section requires the gain to be based upon the "sum of any money received plus the fair market value of the property (other than money) received." This statutory language has remained virtually unchanged since 1924. Since that time numerous cases have applied the *Logan* doctrine to it and have held that a contract which has no ascertainable fair market value can have no fair market value. Thus the gain is computed as the cash comes in under the contract. To use the language of the Tax Court in the *Perry* case cited with approval by the Eighth Circuit in affirming it, *Perry v. Commissioner*, 152 F. 2d 183 (C. C. A. 8th 1945 at page 186):

"The very fact \* \* \* that the statute uses "fair market value" instead of mere "value," indicates intent not to permit the inclusion in income of any contract merely because of intrinsic value."

This interpretation of the section has been recognized not only by the cases in point hereinabove discussed, but also by the leading text on the subject. Mertens, "Law of Federal Income Taxation" (1942), Vol. 10, page 433,

"On the other hand, Congress undoubtedly recognized that under certain circumstances it was possible for property at a given time to have no fair market value."

Furthermore, at least for the last fourteen years, the Commissioner's own regulations under Section 111(b) have recognized that in certain "rare and extraordinary cases" property may have no fair market value. Thus, Article 111-1 of Regulations 86 under the 1934 Revenue Act provided that "the fair market value of property is a question of fact, but only in rare and extraordinary cases will property be considered to have no fair market value." This identical provision has been contained in every subsequent regulation and is presently contained in Regulations 111, Section 29.111-1. The Courts have unanimously held that a contingent contract such as the one presently involved is that rare type of property which has no ascertainable fair market value. This has been the accepted case law for sometime and Congress has changed the statute on many occasions without making any change in the controlling language of Section 111(b).

It is submitted, therefore, that the opinion of the lower court is in conformity with the controlling statute, whereas the suggested interpretation of appellants cannot be reconciled with it.

IV.

**Appellants Attempt to Distinguish the Present Case  
From the Logan Case Is Lacking in Substance.**

At pages 10 and 11 of their brief, appellants attempt to distinguish the present case from the *Logan* case. We may dispose of these purported differences summarily in the order there set forth:

**(1) The Present Transaction Involves an Exchange Whereas  
the Logan Case Involved a Sale.**

In the *Logan* case the taxpayer transferred stock and received in exchange cash and a contingent contract. In the instant case the taxpayer surrendered her stock in the Quickwork Company and received in exchange cash, certain other assets and a contingent contract. There is no difference in substance between the two situations. The fact that the Supreme Court in the *Logan* case emphasized that that case involved a sale rather than an exchange is no doubt due to the peculiar provision of the 1918 Revenue Act there involved. Section 202(b) of that Act provided with respect to exchanges that gain or loss upon an exchange would be recognized only if the property received had a fair market value. Otherwise such exchanges were completely tax-free. This treatment applied to exchanges only and not to sales, *Geary v. Commissioner*, 6 B. T. A. 1109, 1112 (1927), where the Board said with reference to a comparable provision of the 1921 Revenue Act:

“The provision of the statute that where property is exchanged for other property no gain or loss is recognized unless the property received in exchange has a readily realizable market value, is applicable only to exchanges of property and not to sales.”

This explains why the Supreme Court was careful to distinguish between a sale and an exchange under the 1918 Act.

Furthermore, there is no significance whatsoever to the peculiar language of Section 115(c) treating a liquidation as an "exchange" and as "full payment." Hardly more is needed than a reference to the legislative history of this section. It was introduced into the law in the 1924 Revenue Act with the following explanation by the House Ways and Means Committee, C. B. 1939-1, part 2, page 249:

"The proposed bill as in the 1918 Act treats a liquidating dividend as a sale of the stock to the corporation and recognizes the true effect of such a distribution."

What more eloquent evidence could be asked that Congress intended to apply no magic meaning to the word "exchange," when in their very Committee Report they refer to it as a "sale." Indeed it has been held that a surrender of stock by a stockholder in complete liquidation constitutes a "sale" as that term is used in other provisions of the Internal Revenue Code.

*Helvering v. Syndicate Varieties*, 140 F. 2d 344, 346 (C. C. A. D. C. 1944).

**(2) In the Present Case the Taxpayer Has Recovered Her Basis Whereas in the Logan Case That Was Not So.**

In the preceding sections of this brief, we have dealt completely with this asserted difference and have pointed out that the statute does not permit any difference in treatment based upon this ground.

- (3) (4) In the Logan Case the Taxpayer Received the Contingent Promise of the Whiting Corporation Rather Than the Contingent Promise of the Quickwork Company to Which She Transferred Her Stock.

This is clearly a distinction without a difference. The taxpayer acquired no greater rights against the Whiting Corporation through the liquidation than she would have received had she exchanged an asset directly to it for such a contingent promise. The same contingencies inherent in the Whiting contract when it was received by the Quickwork Company were inherent in it when it was received by the taxpayer from the Quickwork Company. If it was the type of promise which has "no ascertainable fair market value"—and it is admitted in this case that it does fall within that category—then it has no "fair market value" as that phrase is used in Section 111(b). It matters not, under the language of that section or under the principles established by the cases, whose promise it is.

**(5) The Logan Case Did Not Involve the Capital Gains Provisions.**

We have dealt with this asserted difference also in previous sections of this brief and pointed out that under the statute, since Section 111(b) governs the computation of gain on both the sale of capital and non-capital assets and makes no distinction between the two, the asserted difference must fall.

The most eloquent final answer to all of the above asserted differences is that when they were presented to the various courts in the cases in point previously discussed there were properly considered to be lacking in substance.

### Conclusion.

In the instant case the taxpayer owned a very valuable capital asset—all of the stock of the Quickwork Company. She received in exchange therefor a contingent contract of no ascertainable fair market value. She desires to pay the Government the entire taxes due it on the gain ultimately received by her from the disposition of her stock in the complete liquidation of the Quickwork Company. She feels that she should not be denied this privilege merely because of the fact that the amount ultimately received for such capital asset depends on future events and contingencies.

The instant transactions were motivated purely by business considerations on the part of the taxpayer and her corporation. She did not even seek tax advice concerning the consequences to her of these events. This is eloquently proved by the fact that in her 1940 income tax return, she reported the receipts under the Whiting contract which she received after the liquidation as ordinary income and let the statute of limitations run without filing a claim for refund based upon their proper treatment as capital gains. Thus we are not involved with a situation where the taxpayer attempted to utilize the *Logan* doctrine to secure a tax advantage where business considerations would dictate a different process. The entire present transaction was based wholly upon business considerations.

The judgment of the lower court is in accord with all of the decided cases on the subject, is in conformity with the

statute as interpreted by said cases, and is recognized by the Commissioner of Internal Revenue in his own regulations since 1934. It is fair and equitable.

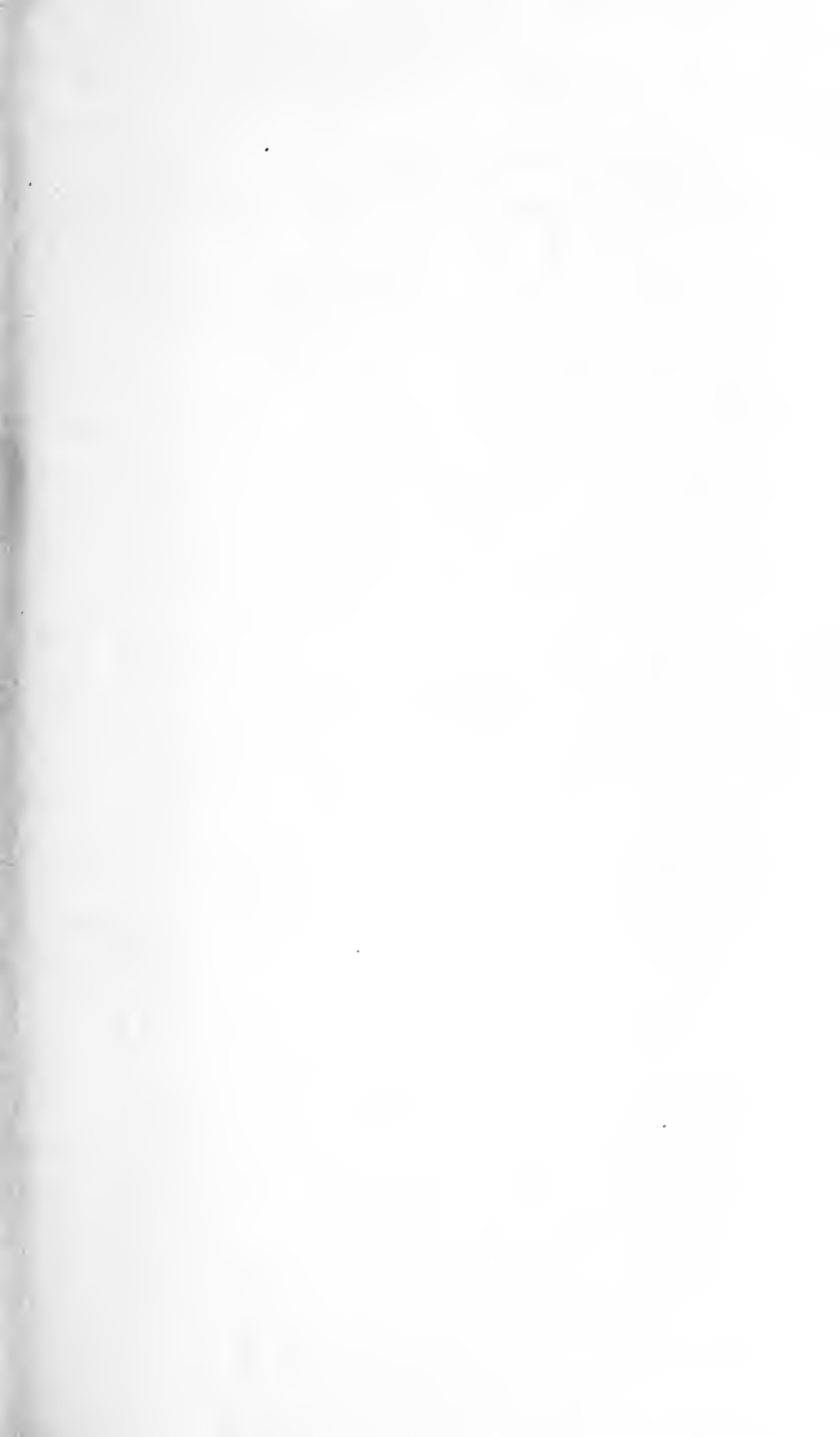
The judgment should be affirmed.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER,

By BERT A. LEWIS,

*Attorneys for Appellee.*





## APPENDIX.

United States Court of Appeals, for the Second Circuit.

No. 26—October Term, 1948.

(Argued October 6, 1948. Decided November 29, 1948.)

Docket No. 20999.

Commissioner of Internal Revenue, Petitioner, v. Susan J. Carter, Respondent.

Before L. Hand, Swan and Chase, Circuit Judges.

Petition to review a decision of the Tax Court of the United States.

The Commissioner seeks reversal of a decision of the Tax Court holding that income received by the taxpayer in 1943 was taxable as capital gain rather than as ordinary income. 9 T. C. 364. Order affirmed.

Theron Lamar Caudle, Assistant Attorney General, Lee A. Jackson and Irving I. Axelrad, Special Assistants to the Attorney General, for petitioner.

John S. Keith, Attorney for respondent.

SWAN, Circuit Judge:

This appeal presents the question whether income received by the taxpayer in 1943 is taxable as long-term capital gain, as the Tax Court ruled, or as ordinary income as the Commissioner contends. The facts are not in dispute. The taxpayer, Mrs. Carter, had owned for ten years all the stock of a corporation which was dissolved on December 31, 1942. Upon its dissolution all of its assets were distributed to her in kind, subject to

all its liabilities which she assumed. In the distribution she received property having a fair market value exceeding by about \$20,000 the cost basis of her stock, and she reported such excess as a capital gain in her 1942 return and paid the tax thereon. In the corporate liquidation she also received 32 oil brokerage contracts which the parties stipulated had no ascertainable fair market value when distributed. Each contract provided for payment to the corporation of commissions on future deliveries of oil by a named seller to a named buyer. The contracts required no additional services to be performed by the corporation or its distributee, and the future commissions were conditioned on contingencies which made uncertain the amount and time of payment. In 1943 the taxpayer collected commissions of \$34,992.20 under these contracts. She reported this sum as a long-term capital gain; the Commissioner determined it to be ordinary income. The Tax Court held it taxable as capital gain. The correctness of this decision is the sole question presented by the Commissioner's appeal.

Mrs. Carter's stock was a "capital asset" as defined by section 117(a) of the Internal Revenue Code, 26 U. S. C. A., 1940 edition. In exchange for her stock, she received the assets of the corporation upon its dissolution. The tax consequences of such a transaction are controlled by section 115(c) which provides that "the gain or loss to the distributee resulting from such exchange" shall be determined under section 111 but recognized only to the extent provided in section 112. Turning to section 111(a): the "gain from the sale or other disposition of property" is the excess of "the amount realized therefrom" over the adjusted cost basis provided in section 113(b). Paragraph (b) of section 111 defines the

“amount realized from the sale or other disposition of property” to be the sum of money received “plus the fair market value of the property (other than money) received.” Paragraph (c) of the same section provides that “In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this chapter, shall be determined under the provisions of section 112.” That section lays down the general rule, subject to exceptions not pertinent to the case at bar, that “upon the sale or exchange of property” the entire amount of the gain or loss, determined under section 111, shall be recognized. From the foregoing statutory provisions, it is obvious that if the oil brokerage contracts distributed to the taxpayer had then had a “fair market value,” such value would have increased correspondingly the “amount realized” by her in exchange for her stock and would have been taxable as long-term capital gain, not as ordinary income. *Boudreau v. Commissioner*, 5 Cir., 134 F. 2d 360; *Fleming v. Commissioner*, 5 Cir., 153 F. 2d 361. The question presented by the present appeal is whether a different result is required when contract obligations having no ascertainable fair market value are distributed in liquidation of a corporation and collections thereunder are made by the distributee in later years.

In answering this question in the negative, the Tax Court relied primarily upon *Burnett v. Logan*, 283 U. S. 404. That involved a sale of stock, not a distribution in liquidation, under which the seller received cash and the buyer’s promise to make future payments conditioned on contingencies. The cash received did not equal the seller’s cost basis for the stock, and the contingencies af-

fecting future payments precluded ascribing a fair market value to the buyer's promise. In later years payments were made which the seller did not return as income. The decision held that she was not required to do so. With respect to such payments, the court said, pages 412-413:

“As annual payments on account of extracted ore come in they can be readily apportioned first as return of capital and later as profit. \* \* \* When the profit, if any, is actually realized, the taxpayer will be required to respond. The consideration for the sale was \$2,200,000.00 in cash and the promise of future money payments wholly contingent upon facts and circumstances not possible to foretell with anything like fair certainty. The promise was in no proper sense equivalent to cash. It had no ascertainable fair market value. The transaction was not a closed one. Respondent might never recoup her capital investment from payments only conditionally promised. \* \* \* She properly demanded the return of her capital investment before assessment of any taxable profit based on conjecture.”

The Commissioner argues that the Logan case is inapplicable because there the taxpayer had not recovered the cost basis of her stock while here she had. The Tax Court thought the distinction immaterial. We agree. The Supreme Court spoke of the annual payments as constituting “profit” after the seller's capital investment should be returned. Until such return it cannot be known whether gain or loss will result from a sale; thereafter it becomes certain that future payments will result in gain. No reason is apparent for taxing them as ordinary income. As this court said in *Commissioner v. Hopkins*, 126 F. 2d

406, 410, "payments received by the seller after his basis had been extinguished would have been taxable to him as capital gains from the sale of the property," citing *Burnet v. Logan* as authority.<sup>1</sup>

The Commissioner also urges that the *Logan* case is distinguishable because it dealt with a sale of stock rather than exchange of stock for assets distributed in a corporate liquidation. This contention is answered by *White v. United States*, 305 U. S. 281, 288, and *Helvering v. Chester N. Weaver Co.*, 305 U. S. 293, 295, where the court held that the recognition required by section 115(c) of gains and losses on liquidation must for purposes of computation of the tax, be taken to be the same as that accorded to gains and losses on sales of property. Consequently we agree with the Tax Court's ruling that the principle of the *Logan* case is applicable to a corporate liquidation where stock is exchanged in part for contracts having no ascertainable market value, and that future collections under such contracts are taxable as capital gain in the year when received if the distributee has previously recovered the cost basis for the stock.

The Commissioner's argument that such collections are analogous to the receipt of interest or rent upon bonds or real estate distributed in a corporate liquidation overlooks a significant distinction. Payment of interest or rent does not impair the value of the bond or real estate since each remains as a capital asset regardless of the number of payments. See *Helvering v. Manhattan Life*

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<sup>1</sup>For similar rulings see *Haynes v. United States*, 50 F. Supp. 238 (Ct. Cls.); *United States v. Yerger*, 55 F. Supp. 521 (D. C. E. D. Pa.); *Hill's Estate v. Maloney*, 58 F. Supp. 146 (D. C. N. J.); *Nicholson v. Commissioner*, 3 T. C. 596.

Ins. Co., 2 Cir., 71 F. 2d 292, 293. But with respect to the oil brokerage contracts, under which no additional services were to be rendered by the payee, each payment decreases their value until, with the final payment it will be completely exhausted; and, if the payments be treated as income, the distributee has no way to recoup his capital investment, since concededly he has no economic interest in the oil producing properties and therefore no right to depletion deductions.<sup>2</sup> Hence to consider the brokerage payments as ordinary income would produce a most unjust result and one quite unlike the result which follows the distribution of bonds or real estate in a corporate liquidation.

For the foregoing reasons we think the decision of the Tax Court correct. It is affirmed.

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<sup>2</sup>It is true, in the case at bar, the taxpayer had no capital investment in the brokerage contracts because from other assets distributed she had already recovered the cost basis of her stock and the oil brokerage contracts had no ascertainable fair market value. But the Commissioner's analogy argument would be equally applicable if the brokerage contracts had been the only corporate assets distributed and it had been possible to ascribe to them a fair market value of \$21,000. In that case, the distributee's capital investment in the brokerage contracts would have been \$20,000, the cost basis of her stock being \$1,000. She would be entitled to recover her capital investment before she could be charged with receiving either gain or ordinary income, and the only source of recovery would be the payments which would ultimately exhaust the value of the contracts. Hence the answer given above to the analogy argument is apposite.

**No. 12020**

IN THE

**United States Court of Appeals**

FOR THE NINTH CIRCUIT

---

GEORGE T. GOGGIN, as Trustee of the Estate of  
A. Moody & Co., Inc., Bankrupt,

Appellant,

vs.

H. L. BYRAM, Tax Collector for the County of Los  
Angeles, State of California,

Appellee.

---

**TRANSCRIPT OF RECORD**

Upon Appeal From the District Court of the United States  
for the Southern District of California  
Central Division

---

**FILED**

SEP 27 1948

PAUL P. O'BRIEN,



**No. 12020**

IN THE

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County Counsel

ANDREW O. PORTER

Deputy County Counsel

1100 Hall of Records  
Los Angeles 12, Calif. [1\*]

In the District Court of the United States for the  
Southern District of California  
Central Division

In Bankruptcy No. 44737-WM

In the Matter of A. MOODY & CO., INC., a California  
corporation,

Debtor.

PETITION UNDER CHAPTER XI  
(Section 322)  
OF THE BANKRUPTCY ACT

To the Honorable Judges of the Above-Entitled Court:

The verified petition of A. Moody & Co., Inc., a corporation, respectfully represents to the Court as follows:

I.

That your petitioner is now and at all times herein mentioned has been a corporation duly and regularly organized and existing under the laws of the State of California, having its principal place of business at 5300 South San Pedro Street, Los Angeles, in the County of Los Angeles, State of California, being engaged in the manufacture of mattresses and box springs, and is entitled to become a bankrupt under the Acts of Congress relating to bankruptcy, and is not a municipal, railroad, insurance or banking corporation or a building or loan association.

II.

That your petitioner has had its principal place of business and office at 5300 South San Pedro Street, in the City of Los Angeles, [2] County of Los Angeles, State of California, within the above judicial district for

a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

III.

That no bankruptcy proceeding has heretofore been filed by your petitioner and no involuntary petition in bankruptcy is now pending against it.

IV.

That your petitioner is unable to pay its debts as they mature and proposes the arrangement with its unsecured creditors as hereinafter set forth.

V.

That your petitioner alleges, as required by Section 324, Chapter XI of the Bankruptcy Act, as amended:

(a) That your petitioner has no executory contracts except a lease with an option to purchase, covering the building and real property described in the schedules attached hereto.

(b) That a statement of affairs of your petitioner will be filed within the time directed by the above-entitled Court.

(c) That the Clerk's filing fee will be paid upon the filing of this petition.

(d) That your petitioner's assets are located at 5300 South San Pedro Street, in the City of Los Angeles, County of Los Angeles, State of California.

VI.

That your petitioner was incorporated during the month of March, 1946, and took over the manufacturing business of A. Moody & Co., a co-partnership, which co-

partnership had been engaged in the business of manufacturing and selling mattresses for a period of some twenty-nine years. That since the incorporation of debtor herein, your [3] petitioner has been the largest manufacturer of mattresses on the Pacific Coast, and during the first ten months of your petitioner's operations, had sales in excess of One Million Four Hundred Thousand Dollars (\$1,400,000.00). That your petitioner's business has been operating at a profit and can be operated at a profit, but due to a program of expansion and the purchasing of large inventories, has depleted its working capital and is unable to meet its obligations as they mature.

That your petitioner leased premises at 5300 South San Pedro Street, Los Angeles, California, from the Lesco Corporation, and proceeded to consolidate its operations and installed machinery and equipment and fixtures, which resulted in a cash outlay and the incurring of obligations in the amount of One Hundred Seventy-five Thousand Dollars (\$175,000.00).

That your petitioner has a large supply of glass wool warehoused with the Haslett Warehousing Company, the warehouse receipts being pledged with the Bank of America National Trust & Savings Association to secure an obligation in the amount of One Hundred Thirty-one Thousand Nine Hundred Eighty-three and 76/100 Dollars (\$131,983.76). That your petitioner has been withdrawing merchandise as required and paying the sum of Two and 25/100 Dollars (\$2.25) per pound for the glass wool so withdrawn. Said glass wool was purchased by your petitioner for the sum of Three and 40/100 Dollars (\$3.40) per pound.

That your petitioner has been discounting its accounts receivable with the Standard Factors Corporation. Under

said arrangement, a twenty per cent (20%) hold-back is held as reserve against accounts so factored.

## VII.

That your petitioner estimates that its operating expense for the next thirty days will consist of: [4]

Payroll .....	\$ 18,000.00
Utilities .....	1,000.00
Transportation expense .....	1,000.00
Materials and supplies.....	94,000.00
<hr/>	
Total .....	\$114,000.00

That the sale will be made of One Hundred Fifty Thousand Dollars (\$150,000.00) and that the invoices evidencing said sales can be discounted with the Standard Factors Corporation so as to realize One Hundred Twenty Thousand Dollars (\$120,000.00) cash to defray said operating expenses.

## VIII.

The stock of the corporation is owned and subscribed for by Joe Moody, who is the president and general manager, and has been entitled to receive the sum of Two Hundred Dollars (\$200.00) per week as his compensation; that C. W. Jacobson, who is the comptroller and assistant to Mr. Moody, has been and will receive One Hundred Dollars (\$100.00) per week; that sales are handled by M. Malcolm Jones, who is paid the sum of One Hundred Dollars (\$100.00) per week; and that Robert Moody, a cousin of Joe Moody, is production manager and receives One Hundred Dollars (\$100.00) per week. That your petitioner proposes to pay said salaries until the further order of the above entitled court.

## IX.

That your petitioner has heretofore, in connection with Joe Moody, invested money in connection with the development of a saw mill in the San Jacinto Mountains for the purpose of obtaining lumber for its box springs construction and shipping requirements. That a total of Twenty-nine Thousand One Hundred Thirty-two and 87/100 Dollars (\$29,132.87) has been invested in said project.

## X.

That your petitioner has heretofore entered into escrows for the [5] sale of certain parcels of real property in order to provide additional working capital, and that said escrows are in a condition where it is hoped the same may be closed at an early date. That your petitioner will realize from properties sold in connection with said escrows, an estimated net amount of \$7,000.00.

## XI.

That attached hereto and made a part hereof, are schedules of assets and liabilities required by the general orders in Bankruptcy, which schedules contain a list of all creditors now known to your petitioner, with their addresses and the amounts of their obligations.

DEBTOR'S PROPOSED PLAN OF  
ARRANGEMENT

That your petitioner proposes the following plan of arrangement:

Article 1: That the creditors of petitioner be divided into classes and that the proposed classes be as follows:

Class A. Expenses of operation under plan of arrangement as may be allowed and ordered paid.

Class B. Expenses of administration that may be allowed and ordered paid.

Class C. All creditors entitled to priority as provided in Section 64a, subdivisions 2, 4 and 5 of the Acts of Congress relating to Bankruptcy, as amended.

Class D. Obligations as they mature to secured creditors in accordance with the terms of their contracts.

Class E. To pay pro-rata, at such times as this Honorable Court may direct and at intervals not to exceed six months, dividends upon unsecured creditors' claims until said claims are paid in full.

Article II. That said plan of arrangement be carried out by permitting the debtor to remain in possession of its assets with the right to carry on its manufacturing business in the ordinary course under the supervision of a representative of the above entitled court [6] or a creditors' committee, as may be desired by creditors and deemed advisable by the above-entitled Court.

Article III. That petitioner be permitted to make payments from time to time when funds are available in accordance with this plan of arrangement and that petitioner be given an extension of time within which to complete this arrangement and to discharge all of the creditors' claims as provided in this arrangement.

Article IV. That petitioner be permitted to remain in possession of its assets and continue its manufacture and sale of mattresses and box springs, the purchase of materials, the employment of workmen and to conduct and operate its business under the supervision and direction of this Honorable Court with authority to employ agents,

managers, assistants and the necessary labor as may be required to carry out the debtor's plan of arrangement, including the right to borrow money and incur obligations as may be authorized and permitted from time to time by the above-entitled Court, and to secure said obligations if required so to do, as may be ordered and directed by the above-entitled Court.

Article V. All debts incurred after the filing of this petition prior to the confirmation of the plan of arrangement shall be paid in full and in such manner as ordered by the above-entitled Court.

Article VI. The Court shall retain jurisdiction of the debtor's property and the operation of same until the payment in full of all creditors' claims and this Honorable Court be authorized, in its discretion, to countersign all checks signed by the debtor in possession.

Article VII. In the event any claim is in controversy in respect to classification or the amount due, the debtor, under order of Court, may make such deposit in such manner as the Court may direct in respect to said disputed claim and proceed to pay other [7] creditors and be restored to possession pending a final determination of said disputed claim.

## XI.

That your petitioner is advised that Chapter XI of the Bankruptcy Act is the appropriate section of the Act under which to seek relief and that your petitioner verily believes that if its business can be operated in the manner herein designated and if permitted to continue to operate

as proposed in this petition, your petitioner can pay all its just debts in full.

That it is necessary for the speedy and proper administration of the debtor's affairs and the equitable payment of creditors, that all creditors and parties be enjoined from commencing or prosecuting any suit or foreclosure proceeding in any form or manner other than before the above-entitled Court or without permission of the above-entitled Court.

Wherefore, your petitioner prays that proceedings may be had upon this petition in accordance with the provisions of Chapter XI of the Bankruptcy Act as amended. That all creditors and other parties be enjoined from commencing any suit in any Court or conducting any sale or foreclosure proceedings affecting the property of the petitioner or repossessing any property without order of this Honorable Court first had and obtained. That debtor be permitted to pay current labor, operating expenses. That this Honorable Court leave the debtor in possession, with full authority to operate and carry on the debtor's business affairs pending a confirmation of the debtor's proposed plan of arrangement and that an adjudication be stayed. That this Honorable Court require debtor to open the necessary bank account or accounts for the purpose of properly conducting the business and that the funds may be withdrawn upon the signature and countersignature as this Honorable Court may direct and to take [8] such other steps and make such other orders herein as may be necessary for the protection of the debtor and all interest-

ed parties and that your petitioner be granted such other and further relief as is just and proper in the premises.

A. MOODY & CO., INC.,

(Seal)

a California Corporation

By Joe Moody, President

MURCHISON, MYERS & GRAY and  
COBB & UTLEY

By Francis B. Cobb

Attorneys for Debtor [9]

[Verified.] [10]

### CERTIFIED COPY OF RESOLUTION

ADOPTED BY THE BOARD OF DIRECTORS OF  
A. MOODY & CO. INC.

A California Corporation

Resolved that the president and/or secretary of this corporation be and each of them hereby is authorized to file in the District Court of the United States, for the Southern District of California, Central Division, a petition for an arrangement or other appropriate petition under the applicable laws of the United States for and on behalf of the Corporation.

Be It Further Resolved that the firm of Murchison Myers & Gray and the firm of Cobb & Utley be and they hereby are employed by the corporation as its attorneys to file said petition and prosecute such proceedings with relation thereto as in their judgment may be fit and necessary in the premises.

The foregoing resolution was put to a vote and unanimously adopted.

I hereby certify that the foregoing is a full, true and correct copy of a resolution adopted by the board of directors of said corporation at a duly and regularly called and held meeting of said directors held on the 25th day of January, 1947, at which all of the directors of said corporation were present and voted; that said resolution appears on the minutes of said meeting and that it has never been revoked or modified.

I also certify that the foregoing resolution was fully approved by Joe Moody, Bruce Murchison, H. Morton Newman and H. Morton Newman, Jr., being all of the directors of said corporation.

In Witness Whereof, I have hereunto set my hand and the seal of the corporation, this 25th day of January, 1947.

(Seal)

BRUCE MURCHISON

Secretary of A. Moody & Co., Inc., a California  
Corporation

[Endorsed]: Filed Jan. 27, 1947. Edmund L. Smith,  
Clerk. [11]

[Title of District Court and Cause]

APPROVAL OF DEBTOR'S PETITION AND ORDER OF REFERENCE UNDER SECTION 322 OF THE BANKRUPTCY ACT

At Los Angeles, in said District, on Jan. 27, 1947 before the said Court the petition of A. Moody & Co., Inc., a corporation, that he desires to obtain relief under Section 322 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Hubert F. Laugharn, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said A. Moody & Co., Inc., a corporation, shall attend before said referee on Feb. 3, 1947 and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Wm. C. Mathes, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on Jan. 27, 1947.

(Seal)

EDMUND L. SMITH

Clerk

By F. Betz

Deputy Clerk

[Endorsed]: Filed Jan. 27, 1947. Edmund L. Smith, Clerk. [12]

[Title of District Court and Cause]

### ORDER OF ADJUDICATION

A meeting of the creditors of said debtor corporation having been regularly called, and notice thereof having been given in the manner provided by law, and said meeting having been continued from time to time until the 18th day of March, 1947, at 2:00 o'clock P. M. before the undersigned Referee, Cobb & Utley appearing as attorneys for debtor corporation, Craig & Weller and George R. Larwell appearing as attorneys for Creditors' Committee, and Russell B. Seymour and Frank C. Weller appearing for the receiver herein, and certain creditors being represented in person, and it appearing that the said debtor had failed to file a fair, equitable and feasible plan of arrangement, and it also appearing from the statement in open court of attorney Ernest R. Utley for said debtor that the said debtor had no objection to an adjudication of bankruptcy herein, and it also appearing from statement of counsel for the Creditors' Committee that said Committee recommended an adjudication of said debtor corporation, and no creditor in court in [13] person or by counsel having objected to said adjudication, and it appearing to the court that it is for the best interests of the creditors that an order of adjudication be made herein.

Now. Therefore, It Is Ordered that the said debtor corporation be, and it hereby is, adjudicated a bankrupt, and it is directed that bankruptcy be proceeded with pursuant to the provisions of the Bankruptcy Act.

Dated: This 21 day of March, 1947.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed Mar. 24, 1947. Edmund L. Smith,  
Clerk. [14]

[Title of District Court and Cause]

ORDER AUTHORIZING DEBTOR TO REMAIN IN  
POSSESSION

Upon reading and filing the petition of the debtor corporation for relief under Chapter XI and it appearing to the best interest of all parties in interest, that the debtor be permitted to remain in possession of the assets and effects of the above named debtor, and that the business being operated be carried on in the ordinary course until further order of this Court, on motion of Francis B. Cobb, one of the attorneys for the above named debtor, and good cause appearing.

It Is Hereby Ordered that said debtor corporation be and it is hereby authorized to remain in possession of its assets and effects and to carry on the debtor's business in the ordinary course until further order of this Court, but under the supervision and control of this Court.

It Is Further Ordered that the debtor corporation file twice each month a report of the debtor's operations, which report shall contain a summary of all cash received, of all cash disbursed and of all obligations incurred, the amount of sales on credit, the amount of any accounts discounted, the amount of any accounts receivable collected, and profit made or loss sustained. [15]

It Is Further Ordered that the bankrupt shall keep separate books and records of its operations commencing on January 29, 1947, and continue until further order of the Court.

It Is Further Ordered that the bankrupt immediately sign up for gas, water, electricity and telephone and make the required deposit with said utility companies and have readings made in respect to meters in order that

the obligations existing to said companies at that time be separate and apart from obligations to arise in the future.

It Is Further Ordered that the debtor in possession open three bank accounts with the California Bank, 5979 South Broadway, Los Angeles, California, and that the first account shall be known as "A. Moody & Co., Inc., Debtor," and to which account there shall be deposited all income derived by the debtor in position. Disbursement shall be made from said account

Joseph Moody

by checks signed by ~~C. W. Jacobson~~ and countersigned by Hubert F. Laugharn, Referee in Bankruptcy, or any other Referee in Bankruptcy of this Court. The company shall open an account to be known as the "Payroll Account"

Joseph Moody

on which checks shall be signed by <sup>^</sup> C. W. Jacobson; that the debtor shall transfer from the debtor account sufficient funds to meet payroll checks, and the transfer shall be by check and countersigned by the undersigned Referee, or any other Referee of this Court, and accompanying said transfer check shall be presented a complete payroll showing the employees, the amount to be paid to each, and the deductions made for withholding tax, social security and unemployment insurance. The company shall open a third account which shall be known as the "Tax Account." Accompanying each check transferring to the payroll account funds to meet the payroll, there shall be drawn a check on the debtor's account for an amount covering all social security, unemployment insurance and withholding taxes, including the contribution by the debtor corporation, and said check so drawn on the debtor's account shall be deposited in the tax

account, and said tax account [16] shall be used only for the purpose of paying to the proper taxing agencies taxes required to be paid by the debtor corporation. The checks drawn upon said tax account shall be countersigned by the undersigned or any other Referee in Bankruptcy.

It Is Further Ordered that the debtor prepare and file the quarterly tax returns as required by law, and that any funds now held under a trust account to pay taxes shall be transferred to said tax account above provided to be made.

It Is Further Ordered, that until further order of this Court the debtor corporation be authorized and permitted to pay to Joe Moody the sum of Two Hundred Dollars (\$200.00) per week, to C. W. Jacobson the sum of One Hundred Dollars (\$100.00) per week, to M. Malcolm Jones the sum of One Hundred Dollars (\$100.00) per week, and to Robert Moody the sum of One Hundred Dollars (\$100.00) per week, as compensation for their services.

The Court reserves the right to make such other and further orders as may appear proper in the premises.

Dated this 27th day of January, 1947.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed Aug. 3, 1948. Edmund L. Smith,  
Clerk. [17]

[Title of District Court and Cause]

ORDER ON PETITION OF THALCO, A CREDITOR, FOR ORDER VACATING ORDER ALLOWING DEBTOR TO REMAIN IN POSSESSION AND FOR RECEIVER

The petition of Thalco, a corporation, an unsecured creditor herein, having been filed and coming on for hearing on February 11, 1947, before the Honorable Hubert F. Laugharn, Referee herein, after notice thereof given to the Debtor, A. Moody & Co., Inc., and the petitioner appearing by its attorney, George R. Larwill, and the Debtor appearing by its attorneys, Murchison, Myers & Gray and Cobb & Utley, by Francis B. Cobb, and other creditors having appeared, to-wit, Standard Automatic Sprinkler Co., by its attorney, Everett Shilling, Hill Electric Co., by its attorneys, Robert McWilliams and Grainger and Hunt, by Adele O. Carver, and other creditors, to-wit, Modern Springs, Coast Coil Spring Co., Greeno Company, Lester E. Nielson and De Lamar Bed Springs Co., being present by some representative thereof, the Referee having considered said petition and [18] having heard statements of counsel and the creditors so represented having had an informal meeting and having appointed a committee of five for the purpose of meeting with the Debtor, investigating the conditions of Debtor's business and making recommendations to the Referee on the question of the advisability of the appointment of a Receiver herein and such other matters as may presently be pertinent to the said application and to the matter of continuing the business of the Debtor and the matter of continuing the Debtor in possession, and good cause appearing therefor,

It Is Hereby Ordered that the committee appointed by the said creditors, as aforesaid, shall be, and is hereby, appointed, temporarily until the further order of the Referee, an informal creditors' committee to meet, examine into, consider and make recommendations upon the condition of the business of the Debtor, the matters and things set forth in the Debtor's petition on file herein, the question of the advisability of continuing the Debtor in possession and the question of the advisability of the appointment of a Receiver herein and other matters pertinent, relevant and material to the foregoing, the said committee to be advisory to this Referee and to make its recommendations to this Referee as soon as may be practicable;

It Is Further Ordered that said committee shall consist of M. W. Engleman, representing the creditors generally, T. E. Thal, representing Thalco, a corporation, J. Hayden Chapman, representing Coast Coil Springs Co., Rollie Pierce, representing Greeno Company, and Lester C. Nielson, representing Lester C. Nielson Co., with the right to those of the said creditors so designated to substitute other officers or representatives of said creditors;

It Is Further Ordered that the Debtor, A. Moody & Co., Inc., shall furnish to said committee all information pertaining to the matters and things set forth in its petition in bankruptcy on file herein and the information therein contained, all information relating to the present business of the Debtor, its methods of conducting the business, [19] its contracts and commitments, its liabilities, fixed and contingent, and its assets.

It Is Further Ordered that this matter is continued for further hearing to 2:00 o'clock P. M., Friday, February 14, 1947.

Dated this 12th day of February, 1947.

HUBERT F. LAUGHARN

Referee in Bankruptcy [20]

Received copy of the within Order etc., this 12th day of February, 1947. Cobb & Utley, by F. J., Attorneys for Debtor.

[Endorsed]: Filed Aug. 3, 1948. Edmund L. Smith, Clerk. [21]

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[Title of District Court and Cause]

### ORDER APPOINTING RECEIVER

Thalco, a corporation, and an unsecured creditor herein, having filed its petition for an order vacating order allowing debtor to remain in possession and for order appointing Receiver, and said matter having duly come on for hearing on the 10 day of February, 1947, said Thalco appearing by George R. Larwill, and the debtor appearing by its attorneys, Murchison, Myers & Gray and Cobb and Utley, by Francis B. Cobb, and said matter being continued from time to time to March 13, 1947, at which time there appeared said petitioner, by its counsel. and the debtor, by it counsel, and the Creditors' Committee theretofore appointed by the Court appearing in person and by its counsel, George R. Larwill and Frank C. Weller, and evidence having been adduced, and said Creditors' Committee having recommended that the Re-

ceiver be appointed herein, and it appearing to the best interests of creditors of the estate that the prayer of said petition be granted;

Now, Therefore, It Is Ordered that said order allowing [22] debtor to remain in possession be, and hereby is, vacated and George T. Goggin be, and he hereby is, appointed Receiver of all property of whatsoever nature and wheresoever located, now owned by or in possession of said debtor, and all and any property wheresoever located and of whatsoever nature, being property of said debtor and in possession of any agent, servant, officer or representative of said debtor, with authority to take possession of, preserve, care for, inventory, insure, segregate and move all assets of said debtor until the appointment and qualification of a Trustee herein, and with the further authority to collect such accounts receivable as are due to said estate, and with further authority to conduct the business and sell the same as a going concern, if it can be done with benefit to said estate, and said Receiver is authorized to do all and any such acts and take all and any such proceedings as may enable him forthwith to obtain possession of all and any such property; and

It Is Further Ordered that the duties and compensation of said Receiver are hereby specifically extended beyond those of a mere custodian within the meaning of Section 48 of the Bankruptcy Act to embrace the conduct of the business and marshalling of assets, preparation of inventories, collection, sale and disposition of accounts and notes receivable, and conduct of the business of said debtor as hereinabove specifically authorized; and

It Is Further Ordered that all persons, firms and corporations including said debtor, and all attorneys, agents, officers and servants of said debtor herewith de-

liver to said Receiver all property of whatsoever nature and wheresoever located, including merchandise, accounts, notes and bills receivable, drafts, checks, moneys, securities and all other choses in action, account books, records, chattels, lands and buildings, life and fire and all other insurance policies in the possession of them or any of them, and owned by said debtor, and said debtor is ordered forthwith to deliver to said Receiver all and any such property now in the possession of said debtor; and [23]

It Is Further Ordered that all persons, firms and corporations, including all creditors of said debtor and representatives, agents, attorneys and servants of all such creditors, and all sheriffs, marshals, and other officers, and their deputies, representatives and servants are hereby enjoined and restrained from removing, transferring, disposing of or selling or attempting in any way to remove, transfer or dispose of, sell or in any way interfere with any property, assets or effects in possession of said debtor or owned by said debtor, and whether in possession of any officer, agents, attorneys or representatives of said debtor, or otherwise, and all said persons are further enjoined from executing or issuing or causing the execution or issuance of suing out of any Court of any writ, process, summons, attachment, replevin or in any other proceeding for the purpose of impounding or taking possession of or interference with any property owned by or in possession of said debtor or owned by said debtor, and whether in possession of any agents, servants or attorneys of said debtor, or otherwise; and

It Is Further Ordered that the said Receiver is directed and authorized, as provided under the Postal Laws and Regulations of the United States, to receive all mail matter addressed to the above named debtor; and

It Is Further Ordered that before entering upon his duties said Receiver shall furnish a bond conditioned for the faithful performance of his duties, with a good and sufficient surety or sureties, in the sum of \$25,000.00.

Done at Los Angeles, in the Southern District of California, this 14 day of March, 1947.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed Mar. 14, 1947. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Apr. 13, 1948. Edmund L. Smith, Clerk. [24]

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[Title of District Court and Cause]

ORDER APPROVING NOMINATION OF TRUSTEE UNDER PROVISIONS OF SEC. 338, CHAPTER XI IN THE EVENT OF LIQUIDATION

At Los Angeles, in said district on the 24th day of February, 1947.

George T. Goggin of Los Angeles, having been nominated by Creditors, as trustee of the estate of the above named debtor in the event it becomes necessary to administer the estate in Bankruptcy,

It Is Ordered that the nomination of said George T. Goggin, as trustee, be, and it hereby is approved, in case an Order of Adjudication in Bankruptcy is made herein.

and / it shall become necessary to administer the estate in Bankruptcy, he shall thereupon, without further order, be appointed trustee herein, and the amount of his bond upon his appointment, is fixed at .....

Dollars; provided that if at any time the value of the property of the said estate, in the possession of or under the control of the said trustee, shall exceed the amount of the said bond, the said trustee shall forthwith file a petition herein setting forth the facts and praying for an order directing him to file an additional bond in such amount as may be proper.

It Is Further Ordered that all claims filed at or before the first meeting of creditors in this matter be and they are hereby allowed, for voting purposes only, unless otherwise noted on said claims.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed Aug. 3, 1948. Edmund L. Smith,  
Clerk. [25]

Receiver or Trustee  
in Bankruptcy

Bond No. S-425423

Premium: \$100.00 per annum

[Crest]

ASSOCIATED INDEMNITY CORPORATION

Head Office

332 Pine Street, San Francisco

In the District Court of the United States for the  
Southern District of California

Central Division

No. 44737-WM In Bankruptcy

In the Matter of A. MOODY & CO., INC., a corporation,  
Bankrupt.

### BOND OF TRUSTEE

Know All Men By These Presents, That we, George T. Goggin, of Los Angeles, California, as Principal, and Associated Indemnity Corporation, a corporation organ-

ized and existing under the laws of the State of California and having its principal office in the City and County of San Francisco, State of California, as surety, are held and firmly bound unto the United States of America, in the sum of Twenty-Five Thousand and No/100 Dollars (\$25,000.00), in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Signed and Sealed, this 18th day of March, A. D. 1947.

The Condition of this obligation is such, that whereas the above named George T. Goggin was on the 18th day of March, A. D. 1947, appointed Trustee in the case pending in bankruptcy in the said Court, wherein A. Moody & Co., Inc., a corporation is the Bankrupt, and he, the said George T. Goggin has accepted said trust with all the duties and obligations pertaining thereto:

Now, Therefore, if the said George T. Goggin as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets and effects of the estate of the said Bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said Trustee, then this obligation to be void; otherwise to remain in full force and virtue.

GEORGE T. GOGGIN [Seal]

ASSOCIATED INDEMNITY CORPORATION

By H. S. Vreeland [Seal]

Attorney-in-Fact

Signed and sealed in the presence of

.....  
.....

State of California  
County of Los Angeles—ss.

On this 18th day of March in the year one thousand nine hundred and forty-seven before me, H. W. Smith, a Notary Public in and for said County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared H. S. Vreeland, known to me to be the Attorney in Fact of the Associated Indemnity Corporation, the corporation described in and that executed the within and foregoing instrument, and known to me to be the person who executed the said instrument on behalf of the said corporation, and he duly acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office, in the said County of Los Angeles, the day and year in this certificate first above written.

[Seal]

H. W. SMITH

Notary Public in and for the County of Los Angeles,  
State of California

My Commission Expires Sept. 22, 1947.

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Examined and Recommended for Approval  
as provided in Rule 28.

Approved the 20 day of March, A. D. 1947.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed Mar. 20, 1947. Hubert F. Laugharn,  
Referee.

[Endorsed]: Filed Mar. 24, 1947. Edmund L. Smith,  
Clerk. [26]

[Title of District Court and Cause]

[CLAIM OF H. L. BYRAM]

At the City of Los Angeles, County of Los Angeles, State of California, on the 28th day of May, 1947, came H. L. Byram, and made oath and says:

That he is the duly appointed, qualified and acting Tax Collector of the County of Los Angeles, State of California, a body corporate and politic;

That the said A. Moody & Co., Inc., who has filed a petition for adjudication in bankruptcy, was at twelve o'clock noon of the first Monday in March, 1947, the owner of the following described personal property, of the assessed value set forth, to wit:

Assessment No. 36556—	Money	\$ 220.00
Goggin, George T., Trustee for	Merchandise	126,950.00
A. Moody & Co., Inc.,	Equipment	34,040.00
354 S. Spring St. Rm. 817		
Los Angeles 13, Calif.	Tax	\$ 9,979.86

That thereafter pursuant to law, a tax in the sum of \$9,979.86 was duly levied against said property for the year 1947.

That said tax is now due and unpaid, and petitioner, on behalf of the County of Los Angeles, respectfully petitions this Court for its order directing the payment of said tax as a preferred claim.

H. L. BYRAM

Tax Collector for the County of Los Angeles

By Geo. A. Shepard

Deputy H.F.L.

Subscribed and sworn to before me this 28th day of May, 1947.

(Seal)

J. F. MORONEY

County Clerk

By F. B. Murphy

Deputy [27]

[Endorsed]: Filed May 31, 1947. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Apr. 13, 1948. Edmund L. Smith, Clerk. [28]

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[Title of District Court and Cause]

## ORDER AUTHORIZING TRUSTEE TO ABANDON BURDENSOME ASSETS

The trustee herein, George T. Goggin, having filed his petition for order authorizing him to abandon certain assets hereinafter described and said petition having duly come on for hearing after notice to creditors and all other persons as provided for by law, said trustee appearing by his attorneys, Frank C. Weller and Russell B. Seymour, and no appearance having been made by other persons, and evidence having been adduced and it appearing to the court and the court so finds, that the date of bankruptcy herein is January 7th, 1947; that prior to the date of bankruptcy the bankrupt had placed certain personal property, to-wit: certain materials and supplies inventoried at approximately \$189,046.03, in the public warehouse of Haslett Warehouse Co. on the premises known as 5300 South San Pedro St., Los Angeles, California, and had received warehouse receipts for said goods and had pledged said ware-

house receipts with the Bank of America National Trust and Savings Association to secure [29] a certain indebtedness owing to said bank which certain indebtedness at the date of bankruptcy amounted to approximately \$117,-716.06; that said indebtedness was and is more than could, at the date of bankruptcy or at any time since, be obtained by the trustee for said personal property or said warehouse receipts; that said personal property and warehouse receipts at all times have been, and are now, a burdensome asset of the estate in that there has never been any equity therein which could be realized by the estate or the trustee and there are heavy charges which have been and are accruing in connection therewith, including, among other things, asserted personal property taxes and warehouse charges; that neither said personal property nor said warehouse receipts, nor any of them, have been taken over by the estate herein or the said trustee and therefore the court concludes and further finds that certain personal property and warehouse receipts are a burdensome asset and

It Is Further Ordered, Adjudged and Decreed that said personal property and warehouse receipts are a burdensome asset of this estate and the said trustee is directed not to take over said assets or any of them.

Dated this 20 day of August, 1947.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed Aug. 20, 1947. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Apr. 13, 1948. Edmund L. Smith, Clerk. [30]

[Title of District Court and Cause]

OBJECTIONS TO CLAIM OF H. L. BYRAM,  
COUNTY TAX COLLECTOR, AND NOTICE  
OF HEARING

Comes now George T. Goggin, trustee herein, and objects to the allowance of the claim of H. L. Byram, Tax Collector of the County of Los Angeles, State of California, on the following grounds, to-wit: (1) That neither the bankrupt nor the estate herein nor any officer of this court was either the owner of, or in possession of, any of the merchandise assessed in the sum of \$126,950.00 on the first Monday in March, 1947; (2) that an order directing the trustee to abandon any interest of the estate in said merchandise has been duly and regularly made herein; and (3) that the amounts of the assessments of said merchandise and of equipment in the sum of \$34,-040.00 and each of them are excessive.

Notice Is Given that a hearing of the foregoing objections will be had before the referee herein, at 343 Federal Building, Temple and Spring Streets, Los Angeles, California, on the 2nd day of September, 1947, at the hour of 2 P. M., of said day.

FRANK C. WELLER and  
RUSSELL B. SEYMOUR

Attorneys for the Trustee

[Endorsed]: Filed Aug. 26, 1947. Hubert F. Laugharn, Referee.

[Endorsed: Filed Apr. 13, 1948. Edmund L. Smith, Clerk. [31]

[Title of District Court and Cause]

ORDER, FINDINGS OF FACT, AND CONCLUSIONS OF LAW RE CLAIM OF TAX COLLECTOR

The trustee herein, George T. Goggin, having filed objections to the allowance of the tax claim filed herein by H. L. Byram, Tax Collector of the County of Los Angeles, State of California, in the principal amount of \$9,979.86, and said objections having duly come on for hearing before this Court on September 2, 1947, and thereafter, Russell B. Seymour and Frank C. Weller, by Russell B. Seymour, appearing for said trustee and Harold W. Kennedy, County Counsel, by Andrew O. Porter, Deputy County Counsel, appearing for said H. L. Byram, and evidence having been presented to the court and argument having been made by counsel, and the matter submitted to the court for its findings of fact, conclusions of law, and orders, now, therefore,

The Court Makes Its Findings of Fact as Follows:

1. That A. Moody & Co., Inc., a corporation, filed its petition for arrangement under the provisions of Chapter XI of the Bankruptcy Act, Section 322, on January 27, 1947; that on the [32] 21st day of March, 1947, and order of adjudication was made under the provisions of Section 376(2) of Chapter XI of the Bankruptcy Act and pursuant to Section 378(2) of said act the proceeding was thereafter conducted in like manner and effect "as if a voluntary petition for adjudication in bankruptcy had been entered on the day when the petition under this chapter was filed"; and said George T. Goggin became the duly appointed, qualified, and acting trustee of the estate of said A. Moody & Co., Inc., bankrupt herein, and

at all times since has been, and now is, the duly appointed, qualified, and acting trustee of the estate of said bankrupt.

2. For several months prior to the filing of the petition of the debtor, the debtor had been engaged in the business of manufacturing mattresses at 5300 South San Pedro Street, Los Angeles, California, and was so engaged at the time of the filing of the petition and continued to be so engaged at said address, pursuant to order of the court, until the time of the appointment of the receiver, who continued such operation until on or about March 18, 1947.

3. Thereafter H. L. Byram, County Tax Collector for Los Angeles County, asserted a tax claim as an expense of administration against the trustee herein in the amount of \$9,979.86. A portion thereof was based upon an assessment of \$126,950.00, of which \$88,118 of that amount represented materials which never came into the possession of the trustee of the bankrupt estate, the same at all times being in the exclusive control of Haslett Warehouse Company upon premises leased by it and against which property there were issued, outstanding warehouse receipts. There was not at bankruptcy or at any later time any interest or asset of value in the property in the possession of the Haslett Warehouse Company and the trustee was not permitted to take over, or to assume, the same as an asset, excepting only that \$992.82 thereof, at assessed valuation, was released to the trustee after the tax date upon pay- [33] ment by him to the pledgee of the warehouse receipts of the reasonable value of such goods so released. Subsequently in the administration of the bankrupt estate, the trustee was directed by proper order of this court to abandon, and did abandon the balance of the warehoused property.

4. On April 4, 1947, Ralph Owen, chief accountant for the bankrupt herein, made, verified, and filed with the Assessor on behalf of the trustee of said bankrupt, the statement required by Section 8 of Article XIII of the Constitution of California and by Section 441 of the Revenue & Taxation Code of California, showing as one item thereof "Mdse. at 5300 S. San Pedro St. value \$126,950. Cotton-Ticking-Mattresses-etc." but the said statement was made without the sanction, approval, or direction of the referee in bankruptcy.

5. The trustee prior to the hearing of these objections and pursuant to the order of the court sold all, or substantially all, of the remaining property included in said assessment for an amount greater than the amount of the total claim filed herein by said Tax Collector.

And the Court Makes Its Conclusions of Law as Follows:

1. That the claim for personal property taxes upon that personal property which the trustee took over as an asset herein (including the item of \$992.82 above indicated) is not a tax claim provable under Section 63 of the Bankruptcy Act but is a proper charge of administration and the same is allowed and the trustee ordered to pay the same in full, to-wit, in the sum of \$4,589.96.

2. That the tax in the amount of \$5,389.90 upon the personal property which never came into the possession of the trustee and which the trustee was ordered to release for the reason that the same was not an asset, should be disallowed as a charge against the trustee as an alleged expense of administration herein. [34]

3. It is the Referee's conclusion that the treatment of the said claim in the manner indicated does not come within the rule of law indicated by *Glass v. Phillips*, 139 Fed. (2) 1016; *In re Ingersoll Co.*, 148 Fed. (2) 282; or *Allied Enterprise, Inc.*, No. 44,758 of this Court.

The Court Makes Its Order as Follows:

It Is Ordered that the said claim be and hereby is reduced to the sum of \$4,589.96 and is allowed in that amount and the trustee is ordered to pay the said allowed amount in full.

Dated this 2 day of February, 1948.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed Feb. 2, 1948. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Apr. 13, 1948. Edmund L. Smith, Clerk. [35]

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[Minutes: Tuesday, February 10, 1948]

Present: The Honorable Paul J. McCormick, District Judge.

It is ordered that all cases pending before Hubert F. Laugharn, Referee resigned, be transferred and re-referred to David B. Head, as Referee in Bankruptcy. [36]

4. On April 4, 1947, Ralph Owen, chief accountant for the bankrupt herein, made, verified, and filed with the Assessor on behalf of the trustee of said bankrupt, the statement required by Section 8 of Article XIII of the Constitution of California and by Section 441 of the Revenue & Taxation Code of California, showing as one item thereof "Mdse. at 5300 S. San Pedro St. value \$126,950. Cotton-Ticking-Mattresses-etc." but the said statement was made without the sanction, approval, or direction of the referee in bankruptcy.

5. The trustee prior to the hearing of these objections and pursuant to the order of the court sold all, or substantially all, of the remaining property included in said assessment for an amount greater than the amount of the total claim filed herein by said Tax Collector.

And the Court Makes Its Conclusions of Law as Follows:

1. That the claim for personal property taxes upon that personal property which the trustee took over as an asset herein (including the item of \$992.82 above indicated) is not a tax claim provable under Section 63 of the Bankruptcy Act but is a proper charge of administration and the same is allowed and the trustee ordered to pay the same in full, to-wit, in the sum of \$4,589.96.

2. That the tax in the amount of \$5,389.90 upon the personal property which never came into the possession of the trustee and which the trustee was ordered to release for the reason that the same was not an asset, should be disallowed as a charge against the trustee as an alleged expense of administration herein. [34]

3. It is the Referee's conclusion that the treatment of the said claim in the manner indicated does not come within the rule of law indicated by *Glass v. Phillips*, 139 Fed. (2) 1016; *In re Ingersoll Co.*, 148 Fed. (2) 282; or *Allied Enterprise, Inc.*, No. 44,758 of this Court.

The Court Makes Its Order as Follows:

It Is Ordered that the said claim be and hereby is reduced to the sum of \$4,589.96 and is allowed in that amount and the trustee is ordered to pay the said allowed amount in full.

Dated this 2 day of February, 1948.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed Feb. 2, 1948. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Apr. 13, 1948. Edmund L. Smith, Clerk. [35]

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[Minutes: Tuesday, February 10, 1948]

Present: The Honorable Paul J. McCormick, District Judge.

It is ordered that all cases pending before Hubert F. Laugharn, Referee resigned, be transferred and re-referred to David B. Head, as Referee in Bankruptcy. [36]

[Title of District Court and Cause]

AFFIDAVIT FOR AND ORDER EXTENDING  
TIME WITHIN WHICH TO FILE PETITION  
FOR REVIEW

State of California

County of Los Angeles—ss.

Andrew O. Porter, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the respondent herein, H. L. Byram, Tax Collector of the County of Los Angeles;

That said respondent feels aggrieved by the order entered herein by the Referee herein, Hubert F. Laugharn, on the 2nd day of February, 1948, and desires to file a petition for review to the United States District Court of said Order made by said Referee on the 2nd day of February, 1948.

Affiant further states that both he and his associates have had no opportunity to prepare said petition for review due to the pressure of other litigation and other work, and prays [37] that an order be made herein by this Court extending the time within which respondent herein may file his petition for review up to and including the 2nd day of March, 1948.

ANDREW O. PORTER

Subscribed and sworn to before me this 11th day of February, 1948.

EARL LIPPOLD

County Clerk

By Marie E. McPherson

Deputy County Clerk

ORDER

Good cause appearing therefor,

It Is Hereby Ordered that the respondent herein, H. L. Byram, Tax Collector of the County of Los Angeles, shall be and is hereby granted up to and including the 2nd day of March, 1948, within which to file his petition for review of the order made by this Court on the 2nd day of February, 1948, to the United States District Court of this District in the above entitled proceeding.

Dated: February 11, 1948.

DAVID B. HEAD

Referee in Bankruptcy

[Endorsed]: Filed Feb. 11, 1948. David B. Head, Referee.

[Endorsed]: Filed Apr. 13, 1948. Edmund L. Smith, Clerk. [38]

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[Title of District Court and Cause]

PETITION FOR REVIEW OF REFEREE'S ORDER  
BY JUDGE

To David B. Head, Esq., Referee in Bankruptcy:

George T. Goggin, trustee for the bankrupt herein, having filed objections to the claim of H. L. Byram, Tax Collector of Los Angeles County, for \$9,979.86; and said objections having duly come on for hearing on September 2, 1947, Russell B. Seymour and Frank C. Weller, by Russell B. Seymour, appearing for said trustee, and Harold W. Kennedy, County Counsel, by Andrew O. Porter, Deputy County Counsel, appearing for H. L.

Byram, County Tax Collector; and evidence having been presented to the court and argument having been made by counsel, and the matter submitted to the Court for its Findings of Fact, Conclusions of Law, and Order,—the Court made the following Findings of Fact, Conclusions of Law, and order, in words and figures as follows:

“The Court Makes Its Findings of Fact as Follows:

1. That A. Moody & Co., Inc., a corporation, filed its petition for arrangement under the provisions of Chapter XI [39] of the Bankruptcy Act, Section 322, on January 27, 1947; that on the 21st day of March, 1947, and order of adjudication was made under the provisions of Section 376(2) of Chapter XI of the Bankruptcy Act and pursuant to Section 378(2) of said act the proceeding was thereafter conducted in like manner and effect ‘as if a voluntary petition for adjudication in bankruptcy had been entered on the day when the petition under this chapter was filed’; and said George T. Goggin became the duly appointed, qualified, and acting trustee of the estate of said A. Moody & Co., Inc., bankrupt herein, and at all times since has been, and now, is the duly appointed, qualified, and acting trustee of the estate of said bankrupt.

2. For several months prior to the filing of the petition of the debtor, the debtor had been engaged in the business of manufacturing mattresses at 5300 South San Pedro Street, Los Angeles, California, and was so engaged at the time of the filing of the petition and continued to be so engaged at said address, pursuant to order of the court, until the time of the

appointment of the receiver, who continued such operation until on or about March 18, 1947.

3. Thereafter H. L. Byram, County Tax Collector for Los Angeles County, asserted a tax claim as an expense of administration against the trustee herein in the amount of \$9,979.86. A portion thereof was based upon an assessment of \$126,950.00, of which \$88,118 of that amount represented materials which never came into the possession of the trustee of the bankrupt estate, the same at all times being in the exclusive control of Haslett Warehouse Company upon premises leased by it and against which property there were issued, outstanding warehouse receipts. There was not at bankruptcy or at any later time any interest or asset of value in the [40] property in the possession of the Haslett Warehouse Company and the trustee was not permitted to take over, or to assume, the same as an asset, excepting only that \$992.82 thereof, at assessed valuation, was released to the trustee after the tax date upon payment by him to the pledgee of the warehouse receipts of the reasonable value of such goods so released. Subsequently in the administration of the bankrupt estate, the trustee was directed by proper order of this court to abandon, and did abandon the balance of the warehoused property.

4. On April 4, 1947, Ralph Owen, chief accountant for the bankrupt herein, made, verified, and filed with the Assessor on behalf of the trustee of said bankrupt, the statement required by Section 8 of Article XIII of the Constitution of California and by Section 441 of the Revenue & Taxation Code of California, showing as one item thereof 'Mdse. at \$300

Byram, County Tax Collector; and evidence having been presented to the court and argument having been made by counsel, and the matter submitted to the Court for its Findings of Fact, Conclusions of Law, and Order,—the Court made the following Findings of Fact, Conclusions of Law, and order, in words and figures as follows:

“The Court Makes Its Findings of Fact as Follows:

1. That A. Moody & Co., Inc., a corporation, filed its petition for arrangement under the provisions of Chapter XI [39] of the Bankruptcy Act, Section 322, on January 27, 1947; that on the 21st day of March, 1947, and order of adjudication was made under the provisions of Section 376(2) of Chapter XI of the Bankruptcy Act and pursuant to Section 378(2) of said act the proceeding was thereafter conducted in like manner and effect ‘as if a voluntary petition for adjudication in bankruptcy had been entered on the day when the petition under this chapter was filed’; and said George T. Goggin became the duly appointed, qualified, and acting trustee of the estate of said A. Moody & Co., Inc., bankrupt herein, and at all times since has been, and now, is the duly appointed, qualified, and acting trustee of the estate of said bankrupt.

2. For several months prior to the filing of the petition of the debtor, the debtor had been engaged in the business of manufacturing mattresses at 5300 South San Pedro Street, Los Angeles, California, and was so engaged at the time of the filing of the petition and continued to be so engaged at said address, pursuant to order of the court, until the time of the

appointment of the receiver, who continued such operation until on or about March 18, 1947.

3. Thereafter H. L. Byram, County Tax Collector for Los Angeles County, asserted a tax claim as an expense of administration against the trustee herein in the amount of \$9,979.86. A portion thereof was based upon an assessment of \$126,950.00, of which \$88,118 of that amount represented materials which never came into the possession of the trustee of the bankrupt estate, the same at all times being in the exclusive control of Haslett Warehouse Company upon premises leased by it and against which property there were issued, outstanding warehouse receipts. There was not at bankruptcy or at any later time any interest or asset of value in the [40] property in the possession of the Haslett Warehouse Company and the trustee was not permitted to take over, or to assume, the same as an asset, excepting only that \$992.82 thereof, at assessed valuation, was released to the trustee after the tax date upon payment by him to the pledgee of the warehouse receipts of the reasonable value of such goods so released. Subsequently in the administration of the bankrupt estate, the trustee was directed by proper order of this court to abandon, and did abandon the balance of the warehoused property.

4. On April 4, 1947, Ralph Owen, chief accountant for the bankrupt herein, made, verified, and filed with the Assessor on behalf of the trustee of said bankrupt, the statement required by Section 8 of Article XIII of the Constitution of California and by Section 441 of the Revenue & Taxation Code of California, showing as one item thereof 'Mdse. at 5300

S. San Pedro St. value \$126,950. Cotton-Ticking-Mattresses-etc.' but the said statement was made without the sanction, approval, or direction of the referee in bankruptcy.

5. The trustee prior to the hearing of these objections and pursuant to the order of the court sold all, or substantially all, of the remaining property included in said assessment for an amount greater than the amount of the total claim filed herein by said Tax Collector.

And the Court Makes Its Conclusions of Law as Follows:

1. That the claim for personal property taxes upon that personal property which the trustee took over as an asset herein (including the item of \$992.82 above indicated) is not a tax claim provable under Section 63 of the Bankruptcy Act but is a proper charge of administration and the same is allowed and the trustee ordered to pay the same in full, to-wit, in the sum of \$4,589.96. [41]

2. That the tax in the amount of \$5,389.90 upon the personal property which never came into the possession of the trustee and which the trustee was ordered to release for the reason that the same was not an asset, should be disallowed as a charge against the trustee as an alleged expense of administration herein.

3. It is the Referee's conclusion that the treatment of the said claim in the manner indicated does not come within the rule of law indicated by *Glass v. Phillips*, 139 Fed. (2) 1016; *In re Ingersoll Co.*, 148 Fed. (2) 282; or *Allied Enterprise, Inc.*, No. 44,748 of this Court.

The Court Makes Its Order as Follows:

It Is Ordered that the said claim be and hereby is reduced to the sum of \$4,589.96 and is allowed in that amount and the trustee is ordered to pay the said allowed amount in full.

Dated this 2 day of February, 1948.

HUBERT F. LAUGHARN  
Referee in Bankruptcy"

That said Findings of Fact, Conclusions, and Order are erroneous for the following reasons:

I.

The Court erred in refusing to make the following Findings agreed to by counsel for the trustee and counsel for the tax collector:

"3. Prior to the filing of the petition the said A. Moody & Co., Inc. had purchased certain merchandise and materials for use in the manufacture of mattresses and had placed said materials in a 'field warehouse' owned and operated by Haslett [42] Warehouse Co. who issued non-negotiable warehouse receipts in conformity with the provisions of the Warehouse Receipts Act of the State of California. Prior to the filing of the petition said warehouse receipts had been pledged by A. Moody & Co., Inc. to secure an indebtedness owing by it in the sum of about \$117,716.06 as of the date of bankruptcy and as of the tax date herein involved, to-wit, the first Monday in March, 1947, at 12 M. Said field warehouse was located at the same address, towit, at 5300 South San Pedro Street, Los Angeles, California."

"5. That the debtor had certain similar merchandise and materials in its factory on the tax date, to

wit, at noon on the first Monday in March, 1947. That the assessor lumped all of said merchandise and material, whether in the warehouse or in the factory, and assessed all of such merchandise and materials in one assessment at \$126,950. That had the merchandise and materials in said warehouse been assessed separately by the Assessor, the assessed value thereof would have been \$88,118. The tax based thereon would amount to \$5,454.50."

"6. On August 20, 1947, an order was made by the Court, after due notice to all creditors and other interested parties, directing and authorizing the abandonment by the trustee of any and all interest of the estate in and to said warehoused goods."

## II.

That the Conclusions and Order are erroneous in disallowing a portion of the tax in the amount of \$5,389.90 for the reason that pursuant to the taxpayer's statement the Assessor assessed all of said merchandise in a single lot at the lump sum of \$126,950.00 and a portion of said merchandise included in said [43] assessment coming into the hands of the receiver herein was sold for an amount greater than the amount of the total claim filed herein by said Tax Collector. (Finding 5.)

## III.

That the Findings and Order are erroneous in concluding that this case is not governed by the interpretation of Section 64(a) 4 of the Bankruptcy Act as announced in—

Glass v. Phillips (CCA 5), 139 F. (2) 1016, 54 A. B. R. N. S. 771]

In re Ingersoll Co. (CCA 10), 148 F. (2) 282, at 284, 57 A. B. R. N. S. 677;

In re Allied Enterprise, Inc., No. 44758-WM  
(Opinion of Referee Laugharn).

IV.

The trustee having filed a property statement with the County Assessor as required by law, showing the ownership of a single lot of merchandise, is now estopped to deny the ownership of all of such merchandise, or to ask this court to divide the lot.

V.

That the Trustee in Bankruptcy had ample opportunity to follow the remedy given by state law, that is, to appear before the County Board of Equalization, a quasi-judicial body, but failed to do so, and is now estopped from questioning said assessment and tax, which have become final and have the force, finality, and effect of a judgment.

VI.

The liability for taxes can not be avoided by abandoning [44] property where a personal liability for the tax has accrued and *because* final under state law.

VII.

That a personal liability for taxes accruing while conducting a business under order of court cannot be avoided by subsequent abandonment of the property.

VIII.

That property taxes in California are determined as of the first Monday in March, and a subsequent abandonment of a portion of the property more than five months later, after the tax had become final under state law, is not effective to avoid liability for the tax.

IX.

That said Order is erroneous, exceeds the jurisdiction of the bankruptcy court in assuming the authority to

redetermine the assessed valuation of property for county tax purposes by arbitrarily dividing the assessed valuation between the property in the bankrupt's factory at 5300 South San Pedro Street, Los Angeles, and the property at the Haslett Warehouse Company at the same address; that by so doing the Court in effect is redetermining said assessment which was regularly made by the County Assessor, a quasi-judicial officer, in accordance with the Constitution and laws of the State of California, equalized by the County Board of Equalization, a quasi-judicial body, and has become final under state law and has the force, finality, and effect of a judgment.

Wherefore, petitioner prays for a review of said Findings, Conclusions, and Order by the Judge; that the Referee be directed to enter the Findings requested by petitioner [45] and to overrule the objections to petitioner's tax claim, and to enter an order for payment of said claim in full.

Dated: March 2, 1948.

H. L. BYRAM

Tax Collector of the County of Los Angeles  
Petitioner

HAROLD W. KENNEDY

County Counsel, and

ANDREW O. PORTER

Deputy County Counsel

Attorneys for Petitioner [46]

[Verified.] [47]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Apr. 13, 1948. Edmund L. Smith,  
Clerk. [48]

[Title of District Court and Cause]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable William Mathes, Judge of the District Court of the United States, Southern District of California:

I, David B. Head, one of the referees in bankruptcy of this court, before the above-entitled matter is pending, do hereby certify:

That on the 2nd day of February, 1948, an order was made by Hubert F. Laugharn my predecessor, and the then-acting referee in bankruptcy in charge of the within proceeding, disallowing in part the claim of H. L. Byram, Tax Collector of Los Angeles County, filed in the sum of \$9,979.86.

Within the time prescribed by law, said claimant filed his Petition for Review of said Order.

The undersigned referee hereby certifies to the Judge (1) the question presented, (2) a summary of the evidence relating thereto, and (3) the findings of the referee. [49]

I.

QUESTION PRESENTED

The question involved appears to be: Whether the bankruptcy court has the power and right, in fixing an expense of administration, to eliminate personal property taxes assessed by the County Assessor on pledged personal property which never came into possession of the bankrupt estate and in which no equity existed at the date of bankruptcy or thereafter, where in the course of administration other personal property, included in the same assessment, was sold for an amount greater than the total assessed taxes.

## II.

## STATEMENT OF EVIDENCE

The evidence, which was presented somewhat informally, in large part by statement of counsel and reference to orders earlier made herein, appears to have been as follows:

A. Moody & Co., Inc., the bankrupt herein, filed a petition for an arrangement under Section 322 of the Bankruptcy Act, on January 27, 1947, and on the same day an order was made herein "placing the debtor in possession" and permitting it to operate its business which was the manufacture and sale of mattresses, and in which business it had been engaged for several months prior to the date of bankruptcy, at 5300 South San Pedro Street, Los Angeles, California. At the date of bankruptcy, at the same address, a portion of the premises were under lease to Haslett Warehouse Company into whose exclusive custody and possession a large quantity of personal property of the bankrupt had already been placed by the bankrupt, and against which personal property warehouse receipts had been issued by Haslett Warehouse Company in conformity to the provisions of the Warehouse Receipts Act of the State of California. Prior to the date of bankruptcy said warehouse receipts had been pledged by the bankrupt to secure an [50] indebtedness owing by it in the sum of about \$117,716.06 as of the date of bankruptcy and as of the tax date herein involved, to-wit, the first Monday in March, 1947, at 12 M., being March 3, 1947. The bankrupt had other personal property in its factory at the date of bankruptcy and on the tax date, some of which was similar to the warehoused goods. The assessor assessed all personal property, whether in the ware house or in the factory, in one

amount, to-wit: \$126,950.00, the tax based thereon being \$9,979.86. If the pledged property had been assessed separately the assessed value thereof would have been \$88,118.00, and the tax based thereon would have been \$5454.50. The order permitting the debtor to remain in possession was vacated March 13, 1947, at which time George T. Goggin was appointed receiver with authority to operate the business. On March 18, 1947, an order of adjudication was made and said George T. Goggin became trustee in bankruptcy with authority to operate the business, as of March 20, 1947. On April 12, 1947, substantially all of the personal property of the estate (excepting the pledged property) was sold for about \$27,000.00. On June 20, 1947, the trustee filed his petition for authority to abandon said pledged property, which authority was thereafter granted, after due notice to all parties. At no time on or after the date of bankruptcy was there any interest or asset of value for the bankrupt estate in the pledged goods, and neither the debtor, nor the receiver, nor the trustee ever took any part of the pledged goods into his possession (excepting that after the tax date there was released to the trustee \$992.82 at assessed valuation of such goods upon payment by the trustee to the pledgee of the warehouse receipts, of the reasonable value of the goods so released), and nothing was ever realized by the estate from said pledged property. On April 4, 1947, Ralph Owen, chief accountant for the bankrupt, made, verified, and filed with the assessor on behalf of the trustee, the statement required by Section 8 of Article XIII of the Constitution of California and by Section 441 of the Revenue & Taxation [51] Code of California, showing as one item thereof "mdse. at 5300 S. San Pedro St. value \$126,950. Cotton-Ticking-Mattresses-etc." but

the said statement was made without the sanction, approval, or direction of the referee in bankruptcy.

### III.

#### FINDINGS OF THE REFEREE

The findings of the referee are set forth in the order under review and therefore are not now repeated.

The undersigned referee transmits herewith the following:

1. Claim of H. L. Byram, Tax Collector of Los Angeles, for \$9,979.86.
2. Objections of the trustee to said claim.
3. Reporter's Transcript of the proceedings.
4. Order *date* February 2, 1948.
5. Petition for Review of Referee's Order by Judge, dated March 2, 1948.
6. Petition and Order Extending Time within which to file Petition for Review.
7. Exhibits: Declaration filed with Assessor (no number). Statement of trustee of pledged goods released after tax date (no number).
8. Order of Appointment of Receiver.
9. Order of Adjudication.
10. Order Confirming Sale, dated April 12, 1947.
11. Petition and Order of Abandonment.

Dated this 13 day of April, 1948.

DAVID B. HEAD

Referee in Bankruptcy.

[Endorsed]: Filed Apr. 13, 1948. Edmund L. Smith, Clerk. [52]

[Title of District Court and Cause]

STIPULATION AND ORDER RE  
SUPPLEMENTAL CERTIFICATE OF REFEREE

It Is Stipulated by the undersigned that an order may be made by this Honorable Court directing David B. Head, Referee in Bankruptcy, to file herein his Supplemental Certificate to Referee's Certificate on Review, dated April 13, 1948, whereby said referee shall transmit to this court the following:

1. Order Placing Debtor in Possession.
2. Order Vacating Order Placing Debtor in Possession.
3. Order Appointing Trustee.

RUSSELL B. SEYMOUR and  
FRANK C. WELLER

By Russell B. Seymour  
Attorneys for George T. Goggin, Trustee

HAROLD W. KENNEDY  
County Counsel, and

ANDREW O. PORTER  
Deputy County Counsel

By Andrew O. Porter  
Attorneys for H. L. Byram, Tax Collector

It Is So Ordered this 29th day of July, 1948.

WM. C. MATHES

Judge of the District Court of the United States

[Endorsed]: Filed Jul. 29, 1948. Edmund L. Smith,  
Clerk. [53]

[Title of District Court and Cause]

SUPPLEMENTAL CERTIFICATE OF REFEREE

To the Honorable William Mathes, Judge of the District Court of the United States, Southern District of California:

I, David B. Head, one of the referees in bankruptcy of this court, before whom the above-entitled matter is pending, do hereby transmit the following documents, to-wit:

1. Order Placing Debtor in Possession.
2. Order Vacating Order Placing Debtor in Possession.
3. Order Appointing Trustee,

and certify that each constituted a part of the record of the proceedings before me in the above entitled matter.

Dated this 29 day of July, 1948.

DAVID B. HEAD

Referee in Bankruptcy

[Endorsed]: Filed Aug. 3, 1948. Edmund L. Smith, Clerk. [54]

In the District Court of the United States  
Southern District of California  
Central Division

In Bankruptcy No. 44,737-WM

In the Matter of A. MOODY & CO., INC., a corporation,  
Bankrupt.

ORDER ON REVIEW OF REFEREE'S ORDER OF  
FEBRUARY 2, 1948 DISALLOWING IN PART  
THE CLAIM OF H. L. BYRAM, TAX COL-  
LECTOR OF THE COUNTY OF LOS AN-  
GELES, FOR PERSONAL PROPERTY TAXES

Upon the petition for review filed March 2, 1948 by H. L. Byram, Tax Collector for the County of Los Angeles, State of California and upon the certificate of Referee David B. Head filed April 13, 1948; and upon the proceedings had before the referee as appears from his certificate; and upon hearing counsel for the parties; and it appearing to the court upon review, from the record of the hearing had before the referee on September 2, 1947 and the referee's findings of fact dated February 2, 1948

(a) that in the year 1947, and subsequent to the date of filing of the original petition herein [Bankruptcy Act, §§ 322, 378(1); 11 U. S. C. §§ 722, 778] the tax assessor for the County of Los Angeles assessed against the bankrupt estate an ad valorem tax in the amount of \$9,979.86 on all the personal property of the bankrupt estate [55] situated within Los Angeles County as of noon on March 3, 1947, including certain personalty stored by the bankrupt in

the Haslett Warehouse, Los Angeles, prior to the petition;

(b) that the aforementioned assessment was in all respects accurate and made in accordance with the laws of the State of California as of the tax day (March 3, 1947) [Constitution of California, Art. XIII; Cal. Rev. & Tax Code, §§ 401-871];

(c) that the referee's order of abandonment dated August 20, 1947—which directed the trustee in bankruptcy “not to take over” the aforementioned property stored in the Haslett Warehouse—did not affect the liability of the bankrupt estate under §§ 62a(1) and 64a(1) of the Bankruptcy Act [11 U. S. C. §§ 102a(1) and 104a(1)] for taxes legally assessed and accruing after bankruptcy [cf: *In re Humeston*, 83 F. (2d) 187 (C. C. A. 2d, 1936); *Robinson v. Dickey*, 36 F. (2d) 147 (C. C. A. 3rd, 1929), cert. den. 281 U. S. 750 (1930)];

(d) that the bankruptcy court, in approving a claim for taxes as an expense of administration, may review a tax assessment [see *Arkansas Corp. v. Comm'n. v. Thompson*, 313 U. S. 132 (1940) and *Gardner v. New Jersey*, 329 U. S. 565 (1947)]; but may not, under §§ 62a(1) and 64a(1) of the Bankruptcy Act [11 U. S. C. §§ 102a(1) and 104a (1)] reduce or disallow a claim for taxes legally assessed under the laws of the taxing sovereign, irrespective of whether or not the assessment has been approved by judicial decree or by act of a quasi-judicial officer or tribunal [cf: *Lyford v. City of New York*, 137 F. (2d) 782 [56] (C. C. A. 2d, 1943)]; and

(e) that accordingly the petitioner herein is entitled to full payment of the \$9,979.86 claim against the bankrupt estate for personal property taxes as an expense of administration [Bankruptcy Act, §§ 62a and 64a(1); 11 U. S. C. §§ 102a(1) and 104a(1); 3 Collier on Bankruptcy, pp. 1509-1519, 2077-2082];

It Is Ordered that the order of the referee, dated February 2, 1948, disallowing in part the claim of H. L. Byram, Tax Collector of the County of Los Angeles, be and said order is hereby vacated and set aside; and the matter is hereby recommitted to the referee with directions to enter an appropriate order allowing the claim in full as an expense of administration.

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to

- (1) Referee David B. Head;
- (2) The attorney for the petitioner; and
- (3) The attorneys for the trustee.

June 4, 1948.

WM. C. MATHES

United States District Judge

Judgment entered Jun. 4, 1948. Docketed Jun. 4, 1948. C. O. Book 51, page 121. Edmund L. Smith, Clerk by Louis J. Somers, Deputy.

[Endorsed]: Filed Jun. 4, 1948. Edmund L. Smith, Clerk. [57]

[Title of District Court and Cause]

NOTICE OF APPEAL TO CIRCUIT COURT OF  
APPEALS, NINTH CIRCUIT

Notice Is Hereby Given that George T. Goggin, as trustee of the estate of A. Moody & Co., Inc., a corporation, Bankrupt, the respondent and trustee herein, hereby appeals to the Circuit Court of Appeals, for the Ninth Circuit, from the order of the Court herein, dated June 4, 1948, made and entered in this action, vacating and setting aside the order of the referee in bankruptcy herein dated February 2, 1948, which disallowed in part the claim of H. L. Byram, Tax Collector of the County of Los Angeles; and recommitting the matter to the referee with directions to enter an appropriate order allowing said claim in full as an expense of administration.

FRANK C. WELLER and  
RUSSELL B. SEYMOUR

By Russell B. Seymour

Attorneys for George T. Goggin, as Trustee of the  
Estate of A. Moody & Co., Inc, a Corporation,  
Bankrupt

[Endorsed]: Filed & mld. copy to County Counsel Jul.  
1, 1948. Edmund L. Smith, Clerk. [58]

[Title of District Court and Cause]

STATEMENT OF POINTS  
(Rule 75(d))

STATEMENT OF POINTS

I.

That the District Court erred in failing to find (if it did make independent findings or failed to adopt the findings of the referee in bankruptcy) as follows:

"Thereafter (after March 18, 1947) H. L. Byram, County Tax Collector for Los Angeles County, asserted a tax claim as an expense of administration against the trustee herein in the amount of \$9,979.86. A portion thereof was based upon an assessment of \$126,950.00, of which \$88,118.00 of that amount represented materials which never come into the possession of the trustee of the bankrupt estate, the same at all times being in the exclusive control of Haslett Warehouse Company upon premises leased by it and against which property there were issued, [59] outstanding warehouse receipts. There was not at bankruptcy or at any later time any interest or asset of value in the property in the possession of the Haslett Warehouse Company and the trustee was not permitted to take over, or to assume, the same as an asset, excepting only that \$992.82 thereof, at assessed valuation, was released to the trustee after the tax date upon payment by him to the pledgee of the warehouse receipts of the reasonable value

of such goods so released. Subsequently in the administration of the bankrupt estate, the trustee was directed by proper order of this court to abandon, and did abandon the balance of the warehoused property."

in that same is contrary to the evidence.

## II.

That the District Court erred in its conclusion of law as follows:

"That the referee's order of abandonment dated August 20, 1947—which directed the trustee in bankruptcy 'not to take over' the aforementioned property stored in the Haslett Warehouse—did not affect the liability of the bankrupt estate under Sections 62a(1) and 64a(1) of the Bankruptcy Act (11 U. S. C. 102(a) 1 and 104a(1)) for taxes legally assessed and accruing after bankruptcy."

in that same is contrary to the law and not supported by the evidence.

## III.

That the District Court erred in its conclusion of law that the bankruptcy court may not, under the foregoing sections reduce or disallow a claim for taxes legally assessed under the laws of the State of California when such tax or a portion thereof is based upon an assessment arising after the date of bankruptcy upon property which never came into the possession of the estate in bankruptcy

and from which nothing was realized by the estate [60] and which after the tax date was abandoned by the trustee upon order of the court, the estate at no time having any interest of value in such property. The foregoing conclusion of law is contrary to the law and is not supported by the evidence.

IV.

That the District Court erred in its conclusion of law that the claimant is entitled to full payment of the \$9,979.86 claim against the bankrupt estate for personal property taxes as an expense of administration, in that same is contrary to the law.

V.

That the District Court erred in its order vacating and setting aside the order of the referee in bankruptcy and directing that the matter herein be recommitted to the referee with directions to enter an appropriate order allowing the claim in full as an expense of administration, in that the said order is contrary to the law.

Dated this 20th day of July, 1948.

RUSSELL B. SEYMOUR and  
FRANK C. WELLER

By Russell B. Seymour

Attorneys for Appellant [61]

Received copy of the within Statement of Points this 21st day of July, 1948. Harold W. Kennedy, County Counsel; by Andrew O. Porter, Deputy.

[Endorsed]: Filed Jul. 22, 1948. Edmund L. Smith, Clerk. [62]

[Title of District Court and Cause]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 65, inclusive, contain full, true and correct copies of Petition Under Chapter XI of the Bankruptcy Act; Approval of Debtor's Petition and Order of Reference Under Section 322 of the Bankruptcy Act; Order of Adjudication; Order Authorizing Debtor to Remain in Possession; Order on Petition of Thalco, a creditor, for Order Vacating Order Allowing Debtor to Remain in Possession and for Receiver; Order Appointing Receiver; Order Approving Nomination of Trustee Under Section 338, Chapter XI of the Bankruptcy Act in Event of Liquidation; Bond of Trustee and Order Approving; Claim of H. L. Byram, Tax Collector; Order Authorizing Trustee to Abandon Burdensome Assets; Objections to Claim of H. L. Byram, County Tax Collector; Order, Findings of Fact and Conclusions of Law re Claim of Tax Collector; Minute Order Entered February 10, 1948; Affidavit for and Order Extending Time Within Which to File Petition for Review; Petition for Review of Referee's Order by Judge; Referee's Certificate on Review; Stipulation and Order re Supplemental Certificate of Referee; Supplemental Certificate of Referee; Order on Review of Referee's Order of February 2, 1948 Disallowing in Part the Claim of H. L. Byram, Tax Collector of the County of Los Angeles, for Personal Prop-

erty Taxes; Notice of Appeal Statement of Points on Appeal and Designation of Record on Appeal, which constitute the Record on Appeal of Geo. T. Goggin, Trustee, to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$16.25 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 9 day of August, A. D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

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[Endorsed]: No. 12020. United States Circuit Court of Appeals for the Ninth Circuit. George T. Goggin, as Trustee of the Estate of A. Moody & Co., Inc., Bankrupt, Appellant, vs. H. L. Byram, Tax Collector for the County of Los Angeles, State of California, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed August 12, 1948.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 12020

GEORGE T. GOGGIN, as Trustee, etc.,

Appellant,

vs.

H. L. BYRAM, etc.,

Appellee.

APPELLANT'S STATEMENT OF POINTS ON  
APPEAL

Comes now the appellant herein and adopts as his points on appeal the statement of points appearing in the transcript of the record.

RUSSELL B. SEYMOUR and  
FRANK C. WELLER

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Service of copy of foregoing "Appellant's Statement of Points on Appeal" is acknowledged this 16th day of August, 1948. Harold W. Kennedy, County Counsel, and A. O. Porter, Deputy, RAF, Attorneys for Appellee.

[Endorsed]: Filed Aug. 17, 1948. Paul P. O'Brien, Clerk.

No. 12020

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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GEORGE T. GOGGIN, as Trustee of the Estate of A. Moody  
& Co., Inc., Bankrupt,

*Appellant,*

*vs.*

H. L. BYRAM, Tax Collector for the County of Los Angeles,  
State of California,

*Appellee.*

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## APPELLANT'S OPENING BRIEF.

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FILED  
OCT 26 1948



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## APPELLANT'S OPENING BRIEF.

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### I.

#### Statement of the Case.

This is an appeal from an order of a District Judge of the Southern District of California reversing an order of a Referee in Bankruptcy of that district in respect to the partial disallowance, to the extent of \$5389.90 of a tax claim filed by appellee as an expense of administration in the total amount of \$9,979.86. The order of the District Court allowed the claim as filed.

## II.

### Statement of Pleadings and Facts Showing Jurisdiction.

The bankruptcy was commenced on January 27, 1947, in the District Court of the United States, Southern District of California, Central Division, by the filing by A. Moody & Co., Inc., a corporation, the bankrupt herein, of an original petition under Section 322, Chap. XI of the Bankruptcy Act (11 U. S. C. A.), for an arrangement between the corporation and its creditors [Tr. p. 2]. Thereafter, and on the same day, the District Court approved of the petition and referred the matter generally to one of the referees in bankruptcy of that court [Tr. p. 12]. The debtor, by order of the court, was permitted to remain in possession, and to carry on its business [Tr. p. 14], which order, however, was vacated on March 14, 1947, and a receiver was appointed [Tr. p. 19]. By order dated March 21, 1947, the debtor was adjudged bankrupt [Tr. p. 13] and George T. Goggin became the duly appointed, qualified and acting trustee in bankruptcy [Tr. p. 23]. On May 31, 1947, the appellee, H. L. Byram, as Tax Collector of the County of Los Angeles, filed in this proceeding his tax claim for \$9,979.86, based on personal property owned by the debtor on the first Monday of March, 1947, and petitioned the court for its order directing payment "as a preferred claim" [Tr. p. 26]. The trustee filed objections to the allowance of the claim [Tr. p. 29], hearings were had, and an order was made by the referee reducing the claim to the amount of \$4,589.96 and directing the trustee to make payment thereof [Tr. p. 30]. A petition for review of such order was filed by the appellee [Tr. p. 35] and the District Court, after hearing, set aside the order of the referee and allowed the claim in full

as filed as an expense of administration [Tr. p. 49]. Within the time provided by law, notice of appeal to the Circuit Court of Appeals, Ninth Circuit, was filed by appellant [Tr. p. 52].

Exclusive jurisdiction of proceedings in bankruptcy is vested in the Federal Courts. Section 2(a), Bankruptcy Act.

The District Courts have original jurisdiction of all matters and proceedings in bankruptcy. Section 41(19), Title 28, U. S. C. A.

The original petition herein was filed by the debtor under section 322 of the Bankruptcy Act (11 U. S. C. A. 722). Section 312(2) of the Bankruptcy Act (11 U. S. C. A. 712(2)) provides that the jurisdiction of the court shall be the same as though voluntary petition for adjudication had been filed and a decree had been entered at the time the petition under Chapter XI was filed. The debtor was adjudicated a bankrupt under the provisions of section 376(2) of the Bankruptcy Act and the proceedings were thereafter carried on pursuant to section 378(2) of the Bankruptcy Act (11 U. S. C. A. 788(2)). The provisions of Chapters I to VI of the Bankruptcy Act apply to proceedings under Chapter XI, where not inconsistent (Section 302, Bankruptcy Act (11 U. S. C. A. 702)).

This proceeding is a proceeding in bankruptcy, being the determination of a claim for the administration expense; and likewise is a matter involving in excess of \$500.00.

Statutes under which the Circuit Court of Appeals is given appellate jurisdiction over this matter are as follows:

Section 316 of the Bankruptcy Act (11 U. S. C. A. 716), provides that where not inconsistent with the pro-

visions of Chapter XI, the jurisdiction of the appellate courts shall be the same as in a bankruptcy proceeding.

Section 225, subdivisions (a) and (c), Title 28, U. S. C. A., grants to the Circuit Court of Appeals appellate jurisdiction of the District Court interlocutory orders and over all controversies in the District Court relating to bankruptcy.

Section 24(a) of the Bankruptcy Act invests the Circuit Court of Appeals with appellate jurisdiction over proceedings in bankruptcy arising from courts of bankruptcy

### III.

#### **Opinion of the Court Below.**

The District Judge did not render any opinion other than what might be contained in his order [Tr. p. 49]. The referee did not render any opinion other than what might be contained in his order [Tr. p. 30].

### IV.

#### **Statement of the Case.**

(NOTE: In lieu of a reporter's transcript of the evidence, respective counsel agreed that the Statement of Evidence [Tr. p. 44], as set out in the Referee's Certificate on Review [Tr. p. 43], would suffice and reference to evidence will be made accordingly. No additional evidence was presented to the District Court.)

A. Moody & Co., Inc., the bankrupt herein, filed a petition for an arrangement under Section 322 of the Bankruptcy Act, on January 27, 1947, and on the same day an order was made herein "placing the debtor in pos-

session” and permitting it to operate its business which was the manufacture and sale of mattresses, and in which business it had been engaged for several months prior to the date of bankruptcy, at 5300 South San Pedro Street, Los Angeles, California. At the date of bankruptcy, at the same address, a portion of the premises were under lease to Haslett Warehouse Company into whose exclusive custody and possession a large quantity of personal property of the bankrupt had already been placed by the bankrupt, and against which personal property warehouse receipts had been issued by Haslett Warehouse Company in conformity to the provisions of the Warehouse Receipts Act of the State of California. Prior to the date of bankruptcy said warehouse receipts had been pledged by the bankrupt to secure an indebtedness owing by it in the sum of about \$117,716.06 as of the date of bankruptcy and as of the tax date herein involved, to-wit, the first Monday in March, 1947, at 12 M., being March 3, 1947. The bankrupt had other personal property in its factory at the date of bankruptcy and on the tax date, some of which was similar to the warehoused goods. The assessor assessed all personal property, whether in the warehouse or in the factory, in one amount, to-wit: \$126,950.00, the tax based thereon being \$9,979.86. If the pledged property had been assessed separately the assessed value thereof would have been \$88,118.00, and the tax based thereon would have been \$5454.50. The order permitting the debtor to remain in possession was vacated March 13, 1947, at which time George T. Goggin was appointed receiver with authority to operate the business. On March 18, 1947, an order of adjudication was made and said George T. Goggin became trustee in bankruptcy with authority to operate the business, as of March 20,

1947. On April 12, 1947, substantially all of the personal property of the estate (excepting the pledged property) was sold for about \$27,000.00. On June 20, 1947, the trustee filed his petition for authority to abandon said pledged property, which authority was thereafter granted, after due notice to all parties. At no time on or after the date of bankruptcy was there any interest or asset of value for the bankrupt estate in the pledged goods, and neither the debtor, nor the receiver, nor the trustee ever took any part of the pledged goods into his possession (excepting that after the tax date there was released to the trustee \$992.82 at assessed valuation of such goods upon payment by the trustee to the pledgee of the warehouse receipts, of the reasonable value of the goods so released), and nothing was ever realized by the estate from said pledged property. On April 4, 1947, Ralph Owen, chief accountant for the bankrupt, made, verified, and filed with the assessor on behalf of the trustee, the statement required by Section 8 of Article XIII of the Constitution of California and by Section 441 of the Revenue & Taxation Code of California, showing as one item thereof "mdse. at 5300 S. San Pedro St. value \$126,950. Cotton-Ticking-Mattresses, etc." but the said statement was made without the sanction, approval, or direction of the referee in bankruptcy [Tr. pp. 44, 45, 46].

Thereafter on May 31, 1947, the appellee filed his claim for \$9,979.86 in which he petitioned the Bankruptcy Court for its order directing the payment of said sum as a "preferred claim" [Tr. p. 26]. After a hearing of ob-

jections filed by the trustee, the referee made his order reducing the claim to the sum of \$4,589.96 [Tr. p. 30]. The objections were tried on the theory that the first proviso of Section 64a(4) of the Bankruptcy Act applied to the property in the warehouse and the referee found that a portion thereof was based upon an assessment of \$126,950.00, of which \$88,118 of that amount represented materials which never came into the possession of the trustee of the bankrupt estate, the same at all times being in the exclusive control of Haslett Warehouse Company upon premises leased by it and against which property there were issued, outstanding warehouse receipts and there was not at bankruptcy or at any later time any interest or asset of value in the property in the possession of the Haslett Warehouse Company and the trustee was not permitted to take over, or to assume, the same as an asset, excepting only that \$992.82 thereof, at assessed valuation, was released to the trustee after the tax date upon payment by him to the pledgee of the warehouse receipts of the reasonable value of such goods so released and subsequently in the administration of the bankrupt estate, the trustee was directed by proper order of this court to abandon, and did abandon the balance of the warehoused property [Tr. p. 31].

The referee further found on April 4, 1947, Ralph Owen, chief accountant for the bankrupt herein, made, verified, and filed with the Assessor on behalf of the trustee of said bankrupt, the statement required by Section 8 of Article XIII of the Constitution of California

and by Section 441 of the Revenue & Taxation Code of California, showing as one item thereof "Mdse. at 5300 S. San Pedro St. value \$126,950.00. Cotton-Ticking-Mattresses-etc." but the said statement was made without the sanction, approval, or direction of the referee in bankruptcy [Tr. p. 32].

The referee further found that the trustee prior to the hearing of these objections and pursuant to the order of the court sold all, or substantially all, of the remaining property included in said assessment for an amount greater than the amount of the total claim filed herein by said Tax Collector [Tr. p. 32].

The District Court, without any further evidence than has been adverted to above, set aside the order of the referee, made findings (a) and (b) of his order [Tr. p. 49] to the effect that the appellee had assessed a tax in the amount of \$9,979.86 on all of the personal property of the bankrupt estate situated in Los Angeles County on the tax date, including certain personalty stored by the bankrupt with Haslett Warehouse Company at Los Angeles, prior to the petition in bankruptcy [Tr. p. 49], and that the assessment was in all respects accurate and made in accordance with the laws of the State of California [Tr. p. 50]. No other findings of fact were made by the District Court.

The District Court concluded that the referee's order of abandonment dated August 20, 1947—which directed the trustee in bankruptcy "not to take over" the aforemen-

tioned property stored in the Haslett Warehouse—did not affect the liability of the bankrupt estate under Sections 62a(1) and 64a(1) of the Bankruptcy Act (11 U. S. C. Section 102a(1) and 104a(1)) for taxes legally assessed and accruing after bankruptcy (*cf: In re Humeston*, 83 F. 2d 187 (C. C. A. 2d, 1936); *Robinson v. Dickey*, 36 F. 2d 147 (C. C. A. 3rd, 1929), cert. den. 281 U. S. 750 (1930)) [Tr. p. 50].

The District Court further concluded that the bankruptcy court, in approving a claim for taxes as an expense of administration, may review a tax assessment (see *Arkansas Corp. Commn. v. Thompson*, 313 U. S. 132 (1940) and *Gardner v. New Jersey*, 329 U. S. 565 (1947)); but may not, under Sections 62a(1) and 64a(1) of the Bankruptcy Act (11 U. S. C. Sec. 102a(1) and 104a(1)) reduce or disallow a claim for taxes legally assessed under the laws of the taxing sovereign, irrespective of whether or not the assessment has been approved by judicial decree or by act of a quasijudicial officer or tribunal (*cf: Lyford v. City of New York*, 137 F. 2d 782 (56) (C. C. A. 2d 1943)) [Tr. p. 50].

The District Court then made its order that the appellee was entitled to full payment of the \$9,979.86 claim against the bankrupt estate for personal property taxes as an expense of administration (Bankruptcy Act, Sections 62a and 64a(1); 11 U. S. C. Sec. 102a(1) and 104a(1); 3 *Collier on Bankruptcy*, pp. 1509-1519, 2077-2082) [Tr. p. 51].

V.

Questions Presented.

I.

Whether the bankruptcy court has the power and right, in fixing an expense of administration, to eliminate personal property taxes assessed by the County Assessor on pledged personal property which never came into possession of the bankrupt estate and in which no equity existed at the date of bankruptcy or thereafter, where in the course of administration other personal property, included in the same assessment, was sold for an amount greater than the total assessed taxes.

II.

Did the order of abandonment of the foregoing personal property eliminate any tax liability that otherwise might have existed as an expense of administration.

III.

Did the District Court err in failing to adopt the findings of the referee in bankruptcy.

IV.

Did the District Court err in its conclusion of law that the appellee is entitled to full payment of its claim as an expense of administration and in its order vacating the order of the referee in bankruptcy.

VI.

Specifications of Error.

Statement of points upon which appellant intends to rely upon appeal are set forth at pages 53-55 and 58 of the transcript. Each of said points is relied upon by appellant and such points are as follows:

I.

That the District Court erred in failing to find (if it did make independent findings or failed to adopt the findings of the referee in bankruptcy) as follows:

“Thereafter (after March 18, 1947) H. L. Byram, County Tax Collector for Los Angeles County, asserted a tax claim as an expense of administration against the trustee herein in the amount of \$9,979.86. A portion thereof was based upon an assessment of \$126,950.00, of which \$88,118.00 of that amount represented materials which never came into the possession of the trustee of the bankrupt estate, the same at all times being in the exclusive control of Haslett Warehouse Company upon premises leased by it and against which property there were issued, outstanding warehouse receipts. There was not at bankruptcy or at any later time any interest or asset of value in the property in the possession of the Haslett Warehouse Company and the trustee was not permitted to take over, or to assume, the same as an asset, excepting only that \$992.82 thereof, at assessed valuation, was released to the trustee after the tax date upon payment by him to the pledgee of the warehouse receipts of the reasonable value of such goods so released. Subsequently in the administration of the bankrupt estate, the trustee was directed by proper order of this court to abandon, and did abandon the balance of the warehoused property.”

in that same is contrary to the evidence.

II.

That the District Court erred in its conclusion of law as follows:

“That the referee’s order of abandonment dated August 20, 1947—which directed the trustee in bankruptcy ‘not to take over’ the aforementioned property stored in the Haslett Warehouse—did not affect the liability of the bankrupt estate under Sections 62a(1) and 64a(1) of the Bankruptcy Act (11 U. S. C. 102a(1) and 104a(1) for taxes legally assessed and accruing after bankruptcy.”

in that same is contrary to the law and not supported by the evidence.

III.

That the District Court erred in its conclusion of law that the bankruptcy court may not, under the foregoing sections reduce or disallow a claim for taxes legally assessed under the laws of the State of California when such tax or a portion thereof is based upon an assessment arising after the date of bankruptcy upon property which never came into the possession of the estate in bankruptcy and from which nothing was realized by the estate and which after the tax date was abandoned by the trustee upon order of the court, the estate at no time having any interest of value in such property. The foregoing conclusion of law is contrary to the law and is not supported by the evidence.

IV.

That the District Court erred in its conclusion of law that the claimant is entitled to full payment of the \$9,979.86 claim against the bankrupt estate for personal property taxes as an expense of administration, in that same is contrary to the law.

VII.

**Summary of Argument.**

POINT I. The Bankruptcy Court had the power and right to eliminate taxes on personal property in which the bankrupt estate had no interest and which did not come into the possession of the bankruptcy court, even though there was other personal property of value in the estate.

A. Jurisdiction to reduce tax claims under present facts is in the bankruptcy court.

B. The subject property did not come into possession of the bankruptcy court.

C. There was no value to the interest of the bankrupt estate in the property.

D. To consider other property in determining the value of the interest of the bankrupt estate is to emasculate the first proviso of Section 64a(4).

POINT II. Assuming, but not conceding, that such property was subject to taxation arising after bankruptcy, the order of abandonment relieved the estate of liability.

POINT III. The District Court erred in not accepting the findings of the referee (if such was the case).

POINT IV. Is dependent upon Points I, II and III and is not independently discussed.

VIII.  
ARGUMENT.

**POINT I. The Bankruptcy Court Had the Power and Right to Eliminate Taxes on Personal Property in Which the Bankrupt Estate Had No Interest and Which Did Not Come Into the Possession of the Bankruptcy Court, Even Though There Was Other Personal Property of Value in the Estate.**

**A. JURISDICTION TO REDUCE TAX CLAIMS UNDER PRESENT FACTS IS IN THE BANKRUPTCY COURT.**

The basis for jurisdiction in respect to tax claims and claims of administration are derived from Section 64a of the Bankruptcy Act which, so far as material, reads as follows:

“The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) . . . ; the costs and expenses of administration . . . ; . . . (4) taxes legally due and owing by the bankrupt to the United States or any State or any sub-division thereof: *Provided*, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further*, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; . . . .”

and Section 62a of the Bankruptcy Act which reads as follows:

“The actual and necessary costs and expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and ex-

amined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estate in which they were incurred.”

The District Court properly ruled “That the Bankruptcy Court, in approving a claim for taxes as an expense of administration, may review a tax assessment,” citing *Arkansas Corporation Commission v. Thompson*, 313 U. S. 132 (1940) and *Gardner v. New Jersey*, 329 U. S. 565 (1947), but in our opinion, erroneously concluded that the Bankruptcy Court “may not, under Sections 62a(1) and 64a(1) of the Bankruptcy Act, reduce or disallow a claim for taxes legally assessed under the laws of the taxing sovereign, irrespective of whether or not the assessment has been approved by judicial decree or by the act of a quasi-judicial officer or tribunal,” citing *Lyford v. City of New York*, 137 F. 2d 782 (C. C. A. 2d 1943).

It will be noted that nowhere does the District Court make even passing reference to the provisions of 64a(4) or particularly to the first proviso thereof:

“*Provided*, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court:”

Before we analyze the authorities of the District Court may we emphasize

(1) That the referee did not attack the valuation of the property assessed by the Tax Collector.

(2) That the referee did not reduce or modify the tax rate used by the assessor.

(3) That the referee only followed the *first proviso* of Section 64a(4).

The essence of *Arkansas Corporation Commission v. Thompson* and of *Gardner v. State of New Jersey* are contained in the following quotations from the latter.

“Third. We held in *Arkansas Corporation Commission v. Thompson, supra*, that the reorganization court lacked the power under Section 77 to redetermine for state tax purposes the property value of a railroad where that value had already been determined in state proceedings which afforded ample protection to the railroad’s rights. We adhere to that decision. Its ruling precludes redetermination by the reorganization court in this case of the valuations underlying the assessments made by the state authorities and the validity of those assessments used as the basis for the computation of the taxes. It may not therefore entertain the objections to New Jersey’s claim which tender those issues. The proper tribunals where those issues may be litigated, if they are still open for any year, are the state agencies and courts and, under special circumstances, the federal courts.”

“Fourth. The rule of *Arkansas Corporation Commission v. Thompson, supra*, does not, however, preclude the reorganization court from adjudicating the other issues raised by the objections to New Jersey’s claim. The contrary view, which the Circuit Court of Appeals apparently took, fails to recognize historic bankruptcy powers which, as we have already pointed out, are part of the arsenal of authority granted the reorganization court by Section 77.

(1) The validity and priority of one lien, whether or not claimed by a State, as against other liens, are questions for the reorganization court. Illustrating

but not limiting the range of that inquiry are questions whether local law creates the lien asserted: whether it was sufficiently perfected prior to the petition for reorganization as to be good against other liens, *cf. New York v. Maclay, supra; United States v. Texas, supra*; whether, if it were inchoate at that time, it could be perfected subsequent to the petition, *Lyford v. State of New York*, 140 F. 2d 840; and whether the lien, though paramount, is subordinate to administration expenses or other claims under either the general bankruptcy rule, *City of New York v. Hall*, 139 F. 2d 935, or the equity rule, 5 Collier on Bankruptcy (14th ed.) 77.21. See *Warren v. Palmer*, 310 U. S. 132.

(2) The extent of the lien—to what property it applies, and whether it is restricted to realty or covers personal property or revenues as well—are also questions for the reorganization court. See *Ecker v. Western Pacific R. Corp., supra*, pp. 489, 503.

(3) The reorganization court may also adjudicate questions pertaining to the amount of a tax claim secured by a lien without crossing the forbidden line marked by *Arkansas Corporation Commission v. Thompson, supra*. There is, for example, the question whether the amount of the claim has been swollen by the inclusion of a forbidden penalty and thus to that extent does not meet the bankruptcy requirements for proof and allowance of claims. Section 57j of the Bankruptcy Act provides that debts owing a State as a 'penalty or forfeiture' shall not be allowed. What claims accruing before bankruptcy and sought to be proved by a State are 'penalties', *New York v. Jersawit*, 263 U. S. 493, and what are not. *Meilink v. Unemployment Reserves Commission*, 314 U. S. 564; the applicability of Section 57j to reorganizations under Section 77; the liability of the estate for pen-

alties incurred by the trustee in the operation of the business; *Boteler v. Ingels*, 308 U. S. 57; what interest, if any, accrues after the petition for reorganization has been filed, *Vanston v. Green*, 329 U. S. ...., are all questions for the reorganization court."

The Supreme Court, in the *Gardner* case, followed substantially *Lyford v. City of New York*, *supra*, cited by the District Court.

"Moreover, the questions here involved are questions of law. The trustee asserts that all but a trivial amount of the tax is levied on nontaxable items as follows: Amounts owed the company by its subsidiaries as interest, but unpaid because it had not paid rentals due the subsidiaries, and hence amounts resulting at most from mere bookkeeping entries in the company's accounts, *Southern Pac. Co. v. Lowe*, 247 U. S. 330, 337, 338, 38 S. Ct. 540, 62 L. Ed. 1142; income from tax-exempt securities deposited with the Industrial Commissioner as security for the company's obligations under the Workman's Compensation Act; and demurrage receipts of the debtor, not taxable locally, since they came from interstate shipments of merchandise into New York. Also included were penalties of \$4,427.77, which are improper if Section 57j applies to these proceedings—a matter upon which lower federal courts are not in accord. Compare *In re Denver & R. G. W. R. Co.*, *supra* (D. C., Colo.), 40 Am. B. R. (N. S.) 520, 27 F. Supp. 983, with *In re Chicago, M., St. P. & P. R. Co.*, *supra*. It would appear, therefore, that in any event these are not issues reserved to the state authorities, under the *Thompson* decision."

*Lyford v. City of New York*, 137 F. 2d 782 (C. C. A. 2d 1943).

The Tax Collector subjected himself to the effect of the *first proviso* by filing his claim. See *Gardner v. State of New Jersey, supra*.

“When a State files a proof of claim in the reorganization court, it is using a traditional method of collecting a debt. A proof of claim is, of course, *prima facie* evidence of its validity. *Whitney v. Dresser*, 200 U. S. 532. But the bankruptcy court whose aid is sought for enforcement of an asserted claim is not bound to treat the tendered proof as conclusive. When objections are made, it is duty bound to pass on them. That process is, indeed, of basic importance in the administration of a bankruptcy estate whether the objective be liquidation or reorganization. Without that sifting process, unmeritorious or excessive claims might dilute the participation of the legitimate claimants.

It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. *Wiswall v. Campbell*, 93 U. S. 347, 351. If the claimant is a State the procedure of proof and allowance is not transmuted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*. It is none the less such because the claim is rejected *in toto*, reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payment in cash. When the State becomes the actor and files

a claim against the fund, it waives any immunity which it otherwise might have had respecting the adjudication of the claim. See *Clark v. Barnard*, 108 U. S. 436, 447-448; *Gunter v. Atlantic Coast Line*, 200 U. S. 273, 284, 289; *Missouri v. Fiske*, 290 U. S. 18, 24-25."

Just as the Bankruptcy Court may determine any of the numerous items cited as expenses in the *Gardner* case, even though a quasi-judicial body has determined a tax, so may, *so must*, the Bankruptcy Court determine what is the interest of the bankrupt estate in the property which is the subject of the tax. We know of no agency or tribunal other than the Bankruptcy Court with authority to make such a determination. We know of no statute in California that permits taxation of an *equity* of a taxpayer.

#### B. THE SUBJECT MATTER DID NOT COME INTO THE POSSESSION OF THE BANKRUPTCY COURT.

The property was not in the possession of the Bankruptcy Court or of any officer thereof, or of the debtor, on either the tax date or at any time from before bankruptcy.

It is possible that the District Court assumed the expression "debtor in possession" (which was the status of the bankrupt on the tax date) to mean that the debtor was physically in possession of the property. At all pertinent times the property was in the exclusive control of Haslett Warehouse Company upon premises leased by it and

against which property there were issued outstanding warehouse receipts pledged before bankruptcy. See:

8 *Collier*, 796.

“Where a debtor continues ‘in possession of his property’ pursuant to Section 342, it does not mean that he is entitled to possession of all his property regardless of who possessed it when the petition was filed. It means rather that the debtor continues in possession of the property of which he had possession when the petition was filed, and that he may acquire possession of property which he is entitled to possess. Nothing in Section 342 is warrant for disturbing the possession of a third party, such as a pledgee, who is lawfully in possession of the property of the debtor.”

C. THERE WAS NO VALUE TO THE INTEREST OF THE  
BANKRUPT ESTATE IN THE PROPERTY.

The evidence is clear in this respect and we believe the appellee will not controvert this point.

At no time on or after the date of bankruptcy was there any interest or asset of value for the bankrupt estate in the pledged goods, and neither the debtor, nor the receiver, nor the trustee ever took any part of the pledged goods into his possession (excepting that after the tax date there was released to the trustee \$992.82 at assessed valuation of such goods upon payment by the trustee to the pledgee of the warehouse receipts, of the reasonable value of the goods so released), and nothing was ever realized by the estate from said pledged property [Tr. p. 45].

D. TO CONSIDER OTHER PROPERTY IN DETERMINING THE VALUE OF THE INTEREST OF THE BANKRUPT ESTATE IS TO EMASCULATE THE FIRST PROVISIO OF SECTION 64A(4).

Section 64a of the Bankruptcy Act of 1898 was as follows:

“a. The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount of legality of any such tax the same shall be heard and determined by the court.”

9 Collier p. 1819 Appendix.

Numerous inequities appeared which required tax payments to be made on *real* property without value to the bankrupt estate. (3 Collier p. 2047, 1926 Amendments.) Section 64a, by Act of May 27, 1926, 44 Stat. 662, was amended to read:

“a. The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, County, district, or municipality, *in the order of priority as set forth in paragraph (b) hereof: Provided, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments the trustee shall be*

*credited with the amounts thereof*, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court." 9 *Collier* p. 1819 Appendix.

In 1938 the section was amended by striking out the word "real" so that the section, since 1938, has read:

" . . . Provided, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court; . . . ." 3 *Collier* p. 2049, 1938 Act (4).

Progressively, it will be noted, the right of taxing authorities was limited. From 1898 to 1926 any and all property taxes were payable; from 1926 to 1938 taxes on *real* property were payable only to an amount "in excess of the value of the interest of the bankrupt estate therein as determined by the court"; in 1938 the same rule became effective in respect to "any property of the bankrupt estate."

It was the contention of appellee in the District Court, not passed on directly, however, that because other property of the bankrupt estate was sold for more than the amount of the tax *on the pledged property* and the *other property*, the total assessed tax should be paid.

We have found no cases on this point by this court.

There are two cases from other Circuits cited by appellee in the Court below, *Glass v. Phillips*, 139 F. 2d 1016 (5th C. C. A.) and *Matter of Ingersoll Co.*, 148 F. 2d 282, which apparently are contrary to the position of the appellant here.

*Glass v. Phillips* involved *personal* property taxes which arose, apparently, prior to the 1938 Amendment to Section 64(4). In any event, the court referred to the 1926 Amendment as the basis for its opinion. However, it does arrive at a result opposed to the contention of the appellant, and construes the 1926 amendment in the same fashion.

*Matter of Ingersoll Co.*, *supra*, also construes the *first* proviso in similar manner, although the court did indicate that no showing had been made by the trustee in that case that the tax involved exceeded in amount the value of the interest of the bankrupt in the land covered by the tax sale certificate in controversy.

Although confessing a probable inability to distinguish either the *Glass* or *Ingersoll* cases, we do not hesitate to contend that irrespective of the holding in either of them, they do not set out either what the *first proviso* directly and expressly commands or what was the undoubted intention of Congress when it passed first the 1926 amendment and then the 1938 amendment, *to reduce tax payments on property of no value to the bankrupt estate*. The 1926 amendment applied merely to *real* property; the 1938 amendment applied to any property, *real* or *personal*.

Yet, if the rationale of the above holdings be adopted, bankruptcy estates will be in the same situation as existed prior even to the 1926 amendment, a tax must be paid on property in which the bankrupt estate has no interest of value. WHY HAVE THE AMENDMENT?

**POINT II. Assuming, but Not Conceding, That Such Property Was Subject to Taxation Arising After Bankruptcy the Order of Abandonment Relieved the Estate of Liability.**

The District Court concluded that the order of abandonment of the warehouse property did not affect the liability of the bankrupt estate under Sections 62a(1) and 64a(1) of the Bankruptcy Act for taxes legally assessed and accruing after bankruptcy, and cited as authority *In re Humeston*, 83 F. 2d 187 (C. C. A. 2d 1936) and *Robinson v. Dickey*, 36 F. 2d 147 (C. C. A. 3d 1929), cert. den. 281 U. S. 750 (1930).

A reading of the *Humeston* case will disclose that payment of the taxes was ordered *because the trustee had occupied and used the property involved, and as an expense for use and occupation and only for the period that he used the property*, and further that the court neither ordered nor permitted the abandonment of the property involved.

A reading of the case of *Robinson v. Dickey* discloses a similar situation arising from controversy between bond holders and the trustee in bankruptcy over payment of costs of operation where the trustee was actually and physically in possession of the property and making use thereof for the benefit of the general creditors.

In the instant case neither the debtor, the receiver, nor the trustee, ever had the use of, or had possession of, or realized anything from, the property in question.

A recent case in California, *Helvey v. United States Building & Loan Ass'n*, 81 Cal. App. 2d 647, lays down the accepted rules regarding the abandonment.

“When assets have been abandoned by a trustee or a receiver, the property, in so far as the abandoner is concerned, is left as though he had never owned

or claimed it and the 'title stands as if no assignment had been made.'

The situation presented is analagous to an unaccepted or a rejected gift—the title is left as though the gift had not been made (*Brown v. Keefe*, 300 U. S. 598, 81 L. Ed. 827; *In re Webb*, 54 Fed. 2d 1065; *In re Moss*, 21 Fed. Supp. 1019). . . . (742) Either a receiver or a trustee has the right to determine whether the assets are so burdensome or of such little value as to render the administration of the same unprofitable, and if he so determines, the court may upon his petition authorize the abandonment of the worthless property."

**POINT III. The District Court Erred in Not Accepting the Findings of the Referee (if Such Was the Case).**

We are not certain that the District Court did refuse to accept the findings of the referee but the order, by implication, might indicate that such was the case. In view of the fact that there is no controversy as to the evidence before the referee and no additional evidence was received by the District Court we do not elaborate further, since the findings of the referee shall be accepted unless clearly erroneous. *General Order No. 47.*

**POINT IV. That the District Court Erred in Its Conclusion of Law That the Claimant Is Entitled to Full Payment of the \$9,979.86 Claim Against the Bankrupt Estate for Personal Property Taxes as an Expense of Administration, in That Same Is Contrary to the Law.**

The foregoing point is, of course, dependent upon the validity of Points I, II and III, and is not independently discussed.

### Conclusion.

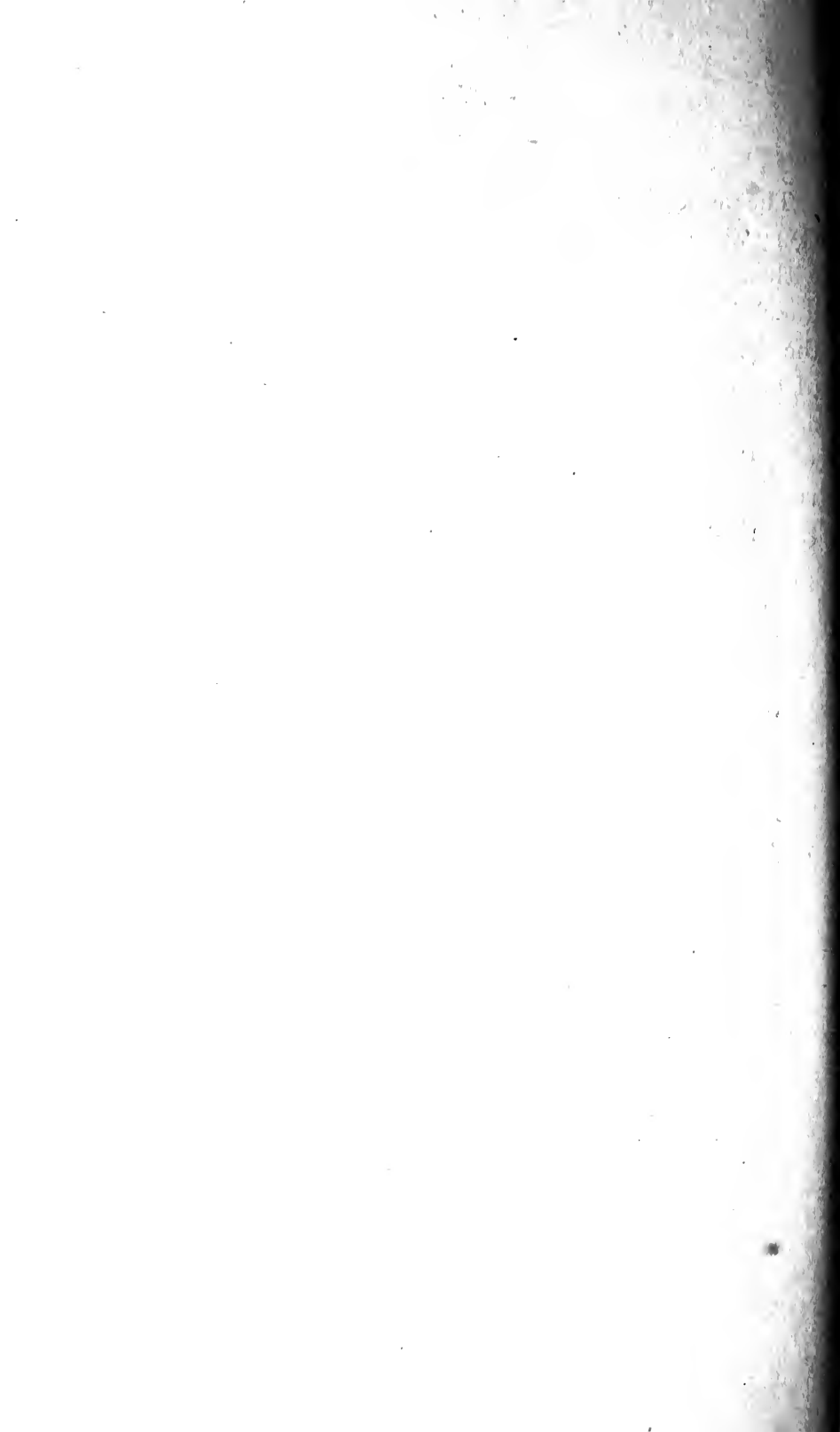
The appellant respectfully urges that this Honorable Court should construe the *first proviso* of Section 64a(4) with a view of determining and effectuating the obvious intention of the Congress when it enacted, respectively, the Amendments of 1926 and of 1938, and that, regardless of the rulings of other Circuit Courts, and until such time as the Supreme Court of the United States has ruled adversely, this Court should hold that the Referee in Bankruptcy made a correct decision; and reverse the order of the District Court below.

Respectfully submitted,

FRANK C. WELLER and

RUSSELL B. SEYMOUR,

*Attorneys for Appellant.*



No. 12020

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**In the  
United States  
Circuit Court of Appeals  
For the Ninth Circuit**

GEORGE T. GOGGIN, as Trustee of the  
Estate of A. Moody & Co., Inc., Bank-  
rupt,

*Appellant,*

vs.

H. L. BYRAM, TAX COLLECTOR  
FOR THE COUNTY OF LOS AN-  
GELES, STATE OF CALIFORNIA,

*Appellee.*

FILED

**Appellee's Brief**

DEC 6 - 1948

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**In the  
United States  
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For the Ninth Circuit**

GEORGE T. GOGGIN, as Trustee of the  
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*Appellant,*

vs.

H. L. BYRAM, TAX COLLECTOR  
FOR THE COUNTY OF LOS AN-  
GELES, STATE OF CALIFORNIA,  
*Appellee.*

No. 12020

**Appellee's Brief**

**Statement of the Case**

Appellee has no objection to appellant's statement of the pleadings and statement of the case as set forth in appellant's opening brief.

**Summary of the Argument**

It is respectfully submitted that the order of the Honorable Wm. C. Mathes, United States District Judge, ordering the referee to allow the appellee tax collector's claim in full as an expense of administration, is correct and should be affirmed, for the following reasons:

1. A tax claim may not be reduced under the first proviso of section 64a(4) of the Bankruptcy Act (11 U. S. C. A. Sec. 104a(4)) unless the *tax* exceeds the *value* of the bankrupt's interest in the property. Here the "property" is one lot of merchandise, part of which was later abandoned to a mortgagee, but the remainder of which came into the bankrupt estate and was sold for more than the amount of the tax.

2. Abandonment does not relate back so as to avoid a personal liability for taxes accrued while conducting the business by order of court. The property was assessed as one unit at the request of the trustee. The liability attached as a personal obligation. Five months later the order of abandonment was made. A trustee or debtor in possession must pay current taxes as they accrue; nothing in the act relieves him of this obligation.

3. The bankruptcy court is without power to re-determine an assessment, or to arbitrarily divide it, after its quasi-judicial determination pursuant to California law. Dividing an assessment is not determining the amount or legality of a tax under the second proviso of section 64a(4) of the Bankruptcy Act (11 U. S. C. A. sec. 104a(4)). It is redetermining the assessment. This the court may not do under *Arkansas Corporation Commission v. Thompson* (1941), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244. The California procedure complies fully with the requirements of this case.

## Argument

### I.

#### **A Tax Claim May Not Be Reduced Under Section 64a(4) Bankruptcy Act, Unless the Tax Exceeds the Value of the Bankrupt's Interest in the Property. There Is No Authority for Dividing the Assessment Where Part of the Property Is Lost or Abandoned.**

Section 64a(4) of the Bankruptcy Act (60 Stats. 330, 11 U. S. C. A. sec. 104a(4)), insofar as material here, reads as follows:

“SEC. 64. DEBTS WHICH HAVE PRIORITY—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof; Provided, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: . . . ”

The Supreme Court has applied the provisos of sec. 64a(4) to tax claims which are entitled to first priority as expenses of administration under sec. 62(a) and sec. 64a(1) (11 U. S. C. A. secs. 102a and 104a(1)). (See: *Arkansas Corporation Commission v. Thompson* (1940), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244.)

In applying the first proviso of sec. 64a(4), quoted above, the Circuit Court of Appeals for the Fifth Circuit said in *Glass v. Phillips* (1943), 139 F. 2nd 1016, at 1017:

“The referee and the court below misconceived the language and purpose of Sec. 64, sub. a. The language, ‘Provided, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court,’ does not provide that no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the tax yielded by an assessment of the value of the interest of the bankrupt estate, but only that the court shall not make an order for the payment of taxes in excess of the value of the interest of any property of the bankrupt estate. If the bankrupt has an interest in property but is not the owner of the whole of such property, no order shall be made to pay the entire tax against the property in excess of the value of the interest of the bankrupt in such property. The language of the statute is not susceptible of any other interpretation.”

In that case only 20% of a stock of merchandise on which an assessment had been made came into the hands of the trustee, but the value of the 20% exceeded the amount of the tax. It was therefore held that the bankrupt estate must pay the entire tax, not merely its proportionate part thereof.

See, to the same effect: *In re Ingersoll Co.* (1945) (C. C. A. 10th), 148 F. 2d 282, at 284, where part of the land included in an assessment was sold before the intervention of bankruptcy and did not come into the custody of the trustee.

In the case at bar, the portion of the merchandise assessed which did come into the possession of the trustee was sold for an amount greater than the amount of the total claim filed by the tax collector, appellee, herein. (Finding 5 of the referee, Tr., p. 32.) It is submitted that the tax claim was therefore properly allowed in full by the Bankruptcy Court.

## II.

### **Abandonment Does Not Relate Back So as to Avoid a Personal Liability for Taxes Accrued While Conducting the Business by Order of Court.**

Property taxes in California accrue on the first Monday in March. (Secs. 1 and 8, Art. XIII, Cal. Const., sec. 405 Cal. Rev. & Tax. Code.) Unsecured personal property taxes are due and payable on the lien date, that is, on the first Monday in March. (Sec. 2901 Rev. & Tax. Code.) At that time the debtor (now the bankrupt herein) was in possession carrying on its business by order of court. (Tr., p. 14.) Personal property may be assessed to the owner or person in possession on tax day. (*RCA Photophone, Inc. v. Huffman* (1935), 5 C. A. (2d) 401, 42 Pac. (2d) 1059; *County of San Diego v. Davis* (1934), 1 Cal. (2d) 145,

33 Pac. (2d) 827.) It was thus properly assessed to the debtor.

Taxes accruing during an attempted reorganization must be paid as expenses of administration in subsequent bankruptcy liquidation. *U. S. v. Killoren* (1941) (C. C. A. 8th), 119 F. 2d 364.

The trustee is estopped to deny that the debtor (now the bankrupt herein) was the owner or person in possession on tax day. (See *People v. Stockton & C. R. R. Co.* (1874), 49 Cal. 414; *Lake County v. Mining Co.* (1885), 68 Cal. 14, 8 Pac. 593.)

The trustee herein on April 4, 1947, filed a verified statement with the tax assessor showing the property owned, possessed or controlled by the debtor on tax day. Such a statement is required by section 8, Art. XIII California Constitution and section 441 Revenue & Taxation Code. In the statement he listed as one item:

“Mdse. at 5300 S. San Pedro St.                      \$126950.  
Cotton-ticking-mattresses-etc.” (Finding 4, Tr.,  
p. 32.)

This included both the merchandise in the factory and that subject to warehouse receipts in the Hazlett Warehouse, (located in the same building). The tax assessor followed the taxpayer's statement and made one assessment of merchandise at 5300 S. San Pedro Street at a value of \$126,950.

The taxes in question were unsecured. (Tr., p. 26.) The assessee of an unsecured personal property tax is personally liable for the tax.

Revenue and Taxation Code, Sec. 3003 and 3004.

See cases under prior but similar statutes:

*San Gabriel etc. Co. v. Witmer Bros. Co.* (1892), 96 Cal. 623 at 636, 29 Pac. 500, 502, 31 Pac. 588;

*City of Los Angeles v. Glassell* (1906), 4 Cal. App. 43, 87 Pac. 241;

*Miller & Lux v. Sparkman* (1932), 128 Cal. App. 449, at 453-454, 17 P. (2) 772.

A debtor or trustee in possession must pay current taxes as they accrue.

*Schwartz v. Hammer*, 194 U. S. 441, 24 S. Ct. 695, 48 L. Ed. 1060;

*Boteler v. Ingels*, 308 U. S. 57, 60 S. Ct. 29, 84 L. Ed. 78.

In the case of *In re Humeston* (1936) (C. C. A. 2nd), 83 F. 2d 187, the trustee took possession of real property belonging to the bankrupt, collected the rents but failed to pay the taxes as they fell due. Then he attempted to abandon the property to the mortgagees, and the Court said (at p. 189):

“However, they were entitled to some relief. Such taxes as fell due during the period of the trustee’s occupation were part of the expenses of that occupation and should be borne by the estate. *Michigan v. Michigan Trust Co.*, 286 U. S. 334, 52

S. Ct. 512, 76 L. Ed. 1136; *MacGregor v. Johnson-Cowdin-Emmerich, Inc.*, 39 F. (2d) 574, 576 (C. C. A. 2); *Central Vermont R. Co. v. Marsch*, 59 F. (2d) 59 (C. C. A. 1); *Prudential Ins. Co. v. Liberdar Holding Corporation*, *supra*, 74 F. (2d) 50. . . . When on the other hand the mortgagor's trustee continues the occupation, he necessarily means to exploit it for profit, and the gross returns must pay the running expenses. Thus taxes which became payable between November 1, 1933, and May 21, 1935, must be paid, and not only the entire face of these, but all interest and penalties accumulated upon them. It was the trustee's duty to pay them when they fell due, and the estate must suffer from his failure. The first order will therefore be modified to conform to this disposition."

See:

*Robinson v. Dickey* (1929) (C. C. A. 3rd), 36 F. (2d) 147, cert. denied 281 U. S. 750 (1930).

Here neither the debtor nor the trustee paid the tax, due on the first Monday in March. The order of abandonment was not made until August 20, 1947, (Tr., p. 28) five months later.

It is respectfully submitted that under these circumstances no provision of the Bankruptcy Act relieves the bankrupt estate of an obligation once accrued to pay taxes.

### III.

#### **The Bankruptcy Court Is Without Power to Redetermine an Assessment, or to Arbitrarily Divide It, After Its Quasi-Judicial Determination Pursuant to California Law.**

Nothing in California law permits a taxpayer to divide a personal property assessment between various items included in a single assessment. There is however specific statutory authority under certain circumstances for the division of an assessment on real property. (Secs. 2803-2808, Rev. & Tax. Code.) The mode is prescribed, requiring full payment of the tax on personal property and possessory interests, the filing of an affidavit with the officer having custody of the tax roll and the payment of a fee. The fact that there is specific authority regarding only real property negatives the existence of any such authority as to personal property.

Nothing in California law permits a taxpayer to pay part of a personal property tax without paying the entire tax. Again there is specific authority regarding real property only. (Secs. 2800-2802, Rev. & Tax. Code.)

Thus if a bankruptcy court or its referee has power to divide an assessment or to pay part of a tax on personal property, some authority therefor must be found in the Bankruptcy Act. It is respectfully submitted that there is no such authority. The only possible applicable provisions are the two provisos of sec.

64a(4). (11 U. S. C. A. sec. 104a(4).) The first proviso has been discussed under point I, *supra*.

The second proviso of section 64a(4) reads as follows:

“ . . . And provided further, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; . . . ”

Dividing an assessment is not determining the amount or legality of a tax. It is redetermining the assessed valuation and proportioning the tax accordingly. This the bankruptcy court has no power to do.

*Arkansas Corporation Commission v. Thompson* (1941), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244;

*Baumann v. Sheehan* (1944) (C. C. A. 8th), 140 F. 2d 747, 751;

*Commonwealth of Pennsylvania v. Aylward* (1946) (C. C. A. 8th), 154 F. 2d 714, 717;

*In re Ingersoll Co.* (1945) (C. C. A. 10th) 148 F. 2d 282, 284.

In *Gardner v. New Jersey* (1947), 329 U. S. 565, 67 S. Ct. 467, 91 L. Ed. 504, the Supreme Court reaffirmed its holding in the Arkansas case (329 U. S. at p. 578) and listed a number of things that the court was authorized to do regarding tax claims. (329 U. S. at pp. 579-582.) The power to redetermine or to divide an assessed valuation is not one of them.

The California procedure complies with the requirements of the Arkansas case. (See sections 405,

441, 454, 616, 617, 1601, 1614, 1646 Rev. & Tax. Code; *Siebe v. Superior Ct.* (1896), 114 Cal. 551, 552, 46 Pac. 456; *Hagar v. Reclamation Dist. No. 108* (1884), 111 U. S. 701, 710, 4 S. Ct. 663, 28 L. Ed. 569; *People v. Goldtree* (1872), 44 Cal. 323; *L. A. etc. Co. v. County of L. A.* (1912), 162 Cal. 164, 121 Pac. 384, 9 A. L. R. 1277; *Universal Consolidated Oil Co. v. Byram* (1944), 25 Cal. (2d) 353, 362, 153 Pac. (2d) 746.) The finality of the quasi-judicial determination of the county board of equalization is not affected by the failure of the taxpayer to avail himself of his right to review. (*Luce v. City of San Diego* (1926), 198 Cal. 405, 245 Pac. 196; *Dawson v. County of L. A.* (1940), 15 Cal. (2d) 77, 81, 98 P. (2d) 495. See *Guardianship of Jacobson* (1947), 30 Cal. (2d) 326, 334, 182 P. (2d) 545; *Fitzgerald v. Herzer* (1947), 78 Cal. App. (2d) 127, 131-132, 177 P. (2d) 364; Res., Judgments, sec. 68, p. 294, 302.)

### Conclusion

It is submitted that the order of the United States District Judge is correct and should be affirmed.

Respectfully submitted,

HAROLD W. KENNEDY,

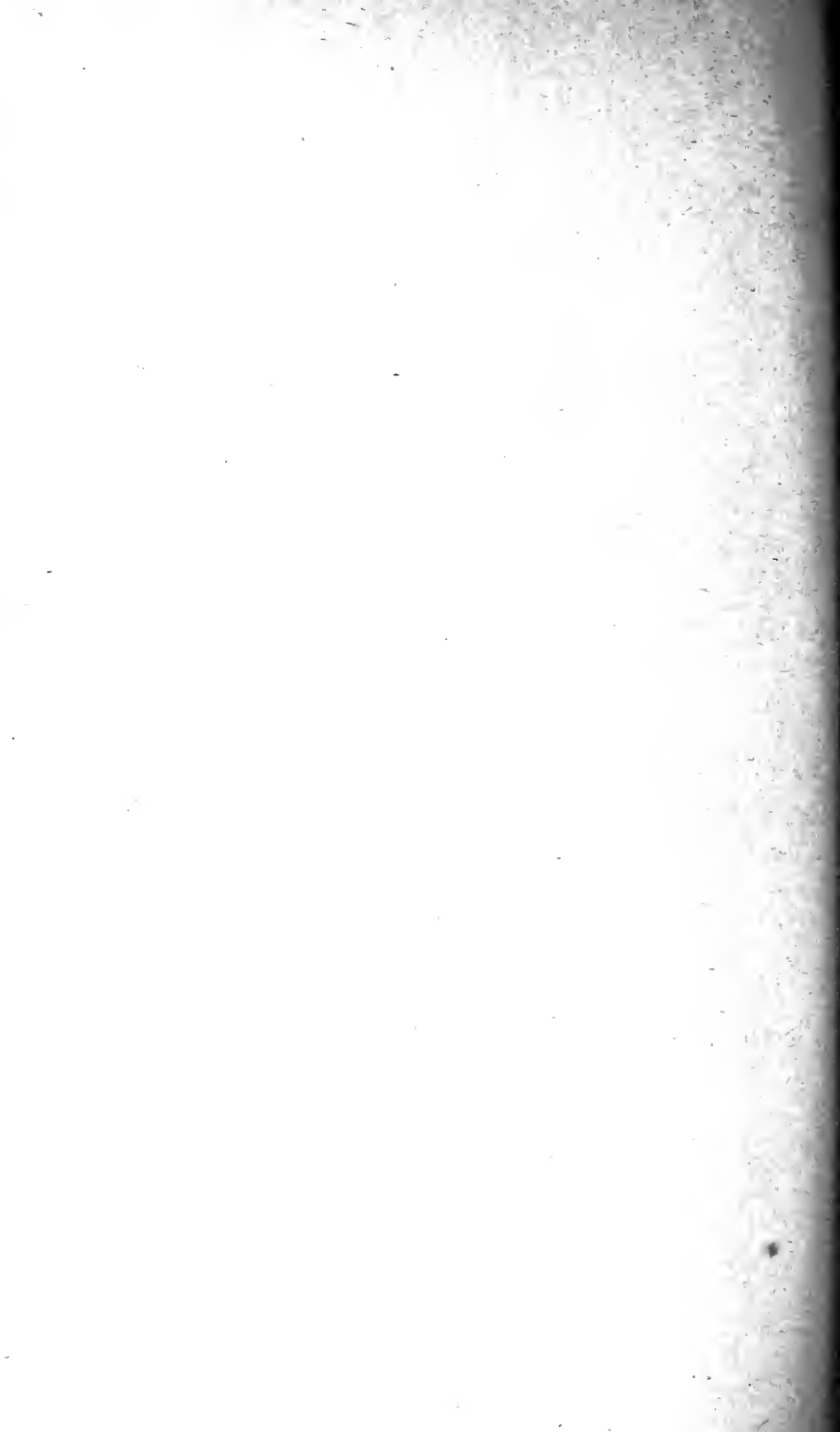
County Counsel,

and

ANDREW O. PORTER,

Deputy County Counsel,

*Attorneys for Appellee.*



No. 12920

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

GEORGE T. GOGGIN, as Trustee of the Estate of A. Moody  
& Co., Inc., Bankrupt,

*Appellant,*

*vs.*

H. L. BYRAM, Tax Collector for the County of Los An-  
geles, State of California,

*Appellee.*

---

Petition of Appellant for Rehearing With Argument  
and Points and Authorities in Support Thereof.

---

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No. 12020

IN THE

# United States Court of Appeals

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GEORGE T. GOGGIN, as Trustee of the Estate of A. Moody  
& Co., Inc., Bankrupt,

*Appellant,*

*vs.*

H. L. BYRAM, Tax Collector for the County of Los An-  
geles, State of California,

*Appellee.*

---

## PETITION OF APPELLANT FOR REHEARING.

---

*To the Honorable Judges of the United States Circuit  
Court of Appeals for the Ninth Circuit:*

Comes now your petitioner, GEORGE T. GOGGIN, as Trustee in Bankruptcy for the estate of A. MOODY & Co., INC., bankrupt, and petitions the Court for a rehearing and reconsideration of the opinion and decree rendered by this Court on February 21, 1949, in the above entitled action affirming the judgment and order of the District Court and allowing appellee's claim in full as an administration expense as prayed for by appellee, for the reason that the said opinion and decree appear to your petitioner to have been based on a seriously erroneous conception of the contentions of the appellant and petitioner and of the law applicable thereto; and to some extent upon an erroneous conception of certain facts, as will hereafter appear in appellant's argument. And for the further reason that said opinion, in fact, will have the result of unduly

narrowing the intended purposes of Section 62 and of the first proviso of Section 64 of the Bankruptcy Act.

Wherefore, the appellant prays that a rehearing be granted herein.

/s/ GEORGE T. GOGGIN,  
*Appellant.*

FRANK C. WELLER AND  
RUSSELL B. SEYMOUR,  
By /s/ RUSSELL B. SEYMOUR,  
*Attorneys for Appellant.*

United States of America,  
Southern District of California,  
Central Division,  
County of Los Angeles,  
State of California.

George T. Goggin, being duly sworn, deposes and says: That he is the appellant in the foregoing entitled matter; that he has read the Petition of Appellant for Rehearing and knows the contents thereof; that the same is true of his own knowledge, except as to the matter which are therein stated upon his information of belief, and as to those matters, that he believes them to be true

/s/ GEORGE T. GOGGIN.

Subscribed and sworn to before me this 21st day of March, 1949.

(Seal) /s/ IRENE GARCIA,  
*Notary Public in and for the County of Los Angeles,  
State of California.*

No. 12020  
IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

GEORGE T. GOGGIN, as Trustee of the Estate of A. Moody  
& Co., Inc., Bankrupt,

*Appellant,*

*vs.*

H. L. BYRAM, Tax Collector for the County of Los Angeles,  
State of California,

*Appellee.*

---

## ARGUMENT, POINTS AND AUTHORITIES.

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An examination of the opinion of this Court filed in connection with the affirmance of the judgment and order of the District Court indicates to us that in the preparation of the opinion the Court was laboring under a serious misapprehension of the contentions of the appellant and petitioner herein and of the law applicable thereto, and to some extent an erroneous conception of certain facts, as will hereafter appear.

The Court commencing with the first sentence of the second paragraph on page 3 of its opinion, states:

(Note: For clarity and convenience ( ) have been added by counsel.)

(1) "The trustee's argument, as we understand it, is that the first proviso of this statute prohibits the payment of a tax to the extent that it is based on an assessment in excess of the value of the interest of the bankrupt estate in the property. We disagree. The proviso confers no authority on the court to reduce a tax claim unless the *tax* exceeds the value of the bankrupt's interest in the property. *Glass v. Phillips*, 5 Cir., 139 F. 2d 1016; *In re Ingersoll*, 10 Cir., 148 F. 2d 282. Such was not the case here. The property assessed was one lot of goods, part of which had come into the possession of the estate and was sold for more than the amount of the total tax."

Perhaps counsel have illy stated themselves, but we believe that at no point has the trustee contended that the first proviso prohibits the payment of a tax to the extent that it is based on an *assessment* in excess of the value of the interest of the bankrupt estate in the property. Our contention, as is indicated in Questions Presented I and II, at page 10 of Appellant's Opening Brief, and, we think, in the course of the oral argument, is directed to an application and a definition of the word "property" in the phrase "property of the bankrupt" contained in the First Proviso, *i. e.*, whether the pledged property should be included as a part of the assets of the estate upon which the assessed tax should be paid, when—first, neither the debtor, receiver, or trustee ever put the pledged property to any use or received anything from it, or even came into possession of it, and second, when an order of abandonment of that property was later made by the bankruptcy court.

Let us put the matter another way.

The free property was assessed for considerably more than the sum of about \$27,000.00, the amount which the trustee received from a sale of the free property. The appellant is making no argument that the *assessment* of the free property should be reduced to the sum received for it; but on the other hand at all times has conceded that the full tax based on a full assessment of the free property should be paid, even though that assessment was actually higher than the amount which the appellant received from the free property.

But the appellant does complain when he is required to pay a *tax* on the pledged property, no matter what the amount of the assessment might have been, when no part of the pledged property ever came into the possession of, or under the control of, or brought any benefit to, the debtor, the receiver, or the trustee, and was actually abandoned within a reasonable time after the appointment of the trustee. *Hennepin County, Minn. v. M. W. Savage*, 8 Cir., 83 F. 2d 453. And see also 3 *Collier on Bankruptcy*, pp. 2137-38:

“Under the proviso as extended by the 1938 Act to include both real and personal property, a needed element has been supplied. Any personal property incumbered, as by a chatel mortgage, or depreciated in value, may be abandoned by the trustee; or in the alternative evaluated as to the extent of the bankrupt’s interest, as by a sale, and taxes paid on the basis of such evaluation.”

(2) "We agree with the trial court that the subsequent abandonment of the pledged property did not operate to avoid the personal liability for taxes accrued while the debtor and the trustee were conducting the business pursuant to court order."

A major premise of the Court's opinion seems to be that the subsequent abandonment of the pledged property did not operate to avoid the personal liability for taxes accrued while the debtor and the trustee were conducting the business pursuant to court order.

May we point out that the trustee was not operating the business on the tax date. And also that neither the debtor in possession, nor the receiver, nor the trustee ever made any use of the pledged property at any time, particularly on the tax date. At no time was the pledged property utilized in respect to the operation of the business.

A discussion of the law relating hereto will be included under the next quotation from the opinion of the Court.

(3) "We find nothing in the Act which relieves the trustee or the debtor in possession from the payment of current taxes as they accrue. Cf. *Boteler v. Ingels*, 308 U. S. 57; *Swarts v. Hammer*, 194 U. S. 441; *United States v. Killoren*, 8 Cir., 119 F. 2d 364."

There do not appear to be any cases, referred to by either the appellee or the Court, which have allowed a tax as an expense of administration in any situation when at the tax date the trustee, receiver, or debtor in possession was neither in possession of the asset taxed nor made some use of such asset.

*Boteler v. Ingels, supra*, involved a tax on automobiles which on the tax date were actually being used by the trustee in the operation of the business.

*Swarts v. Hammer, supra*, involved a tax on property (money) in the possession of the trustee on the tax date; and also was decided long prior to the enactment of the First proviso.

*United States v. Killoren, supra*, merely holds that all claims of administration, including tax claims held to be administration expense, were of the same priority.

We have heretofore distinguished, and apparently this Court has disregarded, the authorities of the District Court supporting its theory on the effect of the order of abandonment, *In re Humeston*, 83 F. 2d 187, and *Robinson v. Dickey*, 36 F. 2d 147, by pointing out that in each case the trustee or receiver was in possession of and utilizing the asset taxed.

We have heretofore cited and quoted from a decision of the Third Circuit, *Northumberland County et al. v. Philadelphia & Reading Coal & Iron Co.*, 131 F. 2d 562, supported by a decision from the Eighth Circuit, *Hennepin County v. Savage*, 83 F. 2d 453, to the effect that taxes are an expense of administration only "when the trustee or debtor actually utilizes in the operation of the business the land upon which the taxes are assessed."

We have also quoted from a recent case in *California, Helvey v. United States Building & Loan Ass'n*, 81 Cal. App. 2d 647, which lays down the accepted rules regarding the abandonment.

"When assets have been abandoned by a trustee or a receiver, the property, in so far as the abandoner is

concerned, is left as though he had never owned or claimed it and the 'title stands as if no assignment had been made.'

The situation presented is analogous to an unaccepted or a rejected gift—the title is left as though the gift had not been made (*Brown v. Keefe*, 300 U. S. 598, 81 L. Ed. 827; *In re Webb*, 54 Fed. 2d 1065; *In re Moss*, 21 Fed. Supp. 1019). . . . (742) Either a receiver or a trustee has the right to determine whether the assets are so burdensome or of such little value as to render the administration of the same unprofitable, and if he so determines, the court may upon his petition authorize the abandonment of the worthless property."

We respectfully request that the Court will reconsider its ruling in the light of these authorities.

(4) "The Bankruptcy Court is given no authority to redetermine an assessment, or to divide it arbitrarily, after it has been quasi-judicially determined pursuant to state law. *Arkansas Corporation Commission v. Thompson*, 313 U. S. 132. Assuming the doubtful proposition that the trustee was entitled to any relief, his remedy was by application to the county board of equalization. *Quinn v. Aero Services, Inc.*, 9 Cir., decided January 24, 1949."

We likewise respectfully submit that this Court has misconstrued the effect of *Arkansas Corporation Commission v. Thompson*, *supra*; for, in *Gardner v. State of New Jersey*, 329 U. S. 565, the Supreme Court itself considerably delimited many apparent generalities contained in the former decision. The essence of the two cases, as stated in

the latter, is set out at pages 16 to 20 of Appellant's Opening Brief. By way of emphasis in an effort to assist the Court, may we again set out a portion of our original quotation:

“Fourth. The rule of *Arkansas Corporation Commission v. Thompson, supra*, does not, however, preclude the reorganization court from adjudicating the other issues raised by the objections to New Jersey's claim. The contrary view, which the Circuit Court of Appeals apparently took, fails to recognize historic bankruptcy powers which, as we have already pointed out, are part of the arsenal of authority granted the reorganization court by Section 77 . . . (3) The reorganization court may also adjudicate questions pertaining to the amount of a tax claim secured by a lien without crossing the forbidden line marked by *Arkansas Commission v. Thompson, supra*. There is, for example, the question whether the amount of the claim has been swollen by the inclusion of a forbidden penalty and thus to that extent does not meet the bankruptcy requirement for proof and allowance of claims. Section 57j of the Bankruptcy Act provides that debts owing a State as a ‘penalty or forfeiture’ shall not be allowed. What claims accruing before bankruptcy and sought to be proved by a State are ‘penalties’, *New York v. Jersawit*, 263 U. S. 493, and what are not. *Meilink v. Unemployment Reserves Commission*, 314 U. S. 564; the applicability of Section 57j to reorganizations under Section 77; the liability of the estate for penalties incurred by the trustee in the operation of the business; *Boteler v. Ingels*, 308 U. S. 57; what interest, if any, accrues after the petition for reorganization has been filed. *Vanston v. Green*, 329 U. S. . . . are all questions for the reorganization court.”

The appellant believes that this Court has overlooked “the historic bankruptcy powers which . . . are part of the arsenal of authority” of the bankruptcy court. The bankruptcy court is precluded from attacking the valuations underlying an assessment or the validity of such assessment used as the basis for the computation of taxes. However, the bankruptcy court may determine whether the payment of such taxes is affected by any matter similar to those matters referred to in the previous quotation. Just as Section 57j provides that no penalty shall be paid, even though a taxing agency has said that it should be paid, so the first proviso provides that no part of a tax, even though otherwise properly assessed shall not be paid if the tax is on property in which the bankrupt estate has no interest of value. And so Section 62 provides that only proper expenses of administration shall be paid, even though based on a tax properly assessed.

Appellant points out that *Quinn v. Aero Services, Inc.*, *supra*, is dissimilar to the instant case in that in the *Quinn* case the assessment was made prior to the filing of the petition in bankruptcy; and involves neither the first proviso nor the feature of abandonment contained herein.

The appellant likewise calls to the attention of the Court that the last sentence on page 1 of the opinion, “The balance of the bankrupt’s goods, of like character with those in the field warehouse. . . .” should read “The balance of the bankrupt’s goods, *some* of like character with those in the field warehouse. . . .,” the word “some” having been omitted. [Tr. p. 44, third line from bottom.]

Conclusion.

The appellant respectfully submits that a rehearing of the within matter should be granted and the order of the referee should be sustained.

Dated: March 21, 1949.

FRANK C. WELLER and

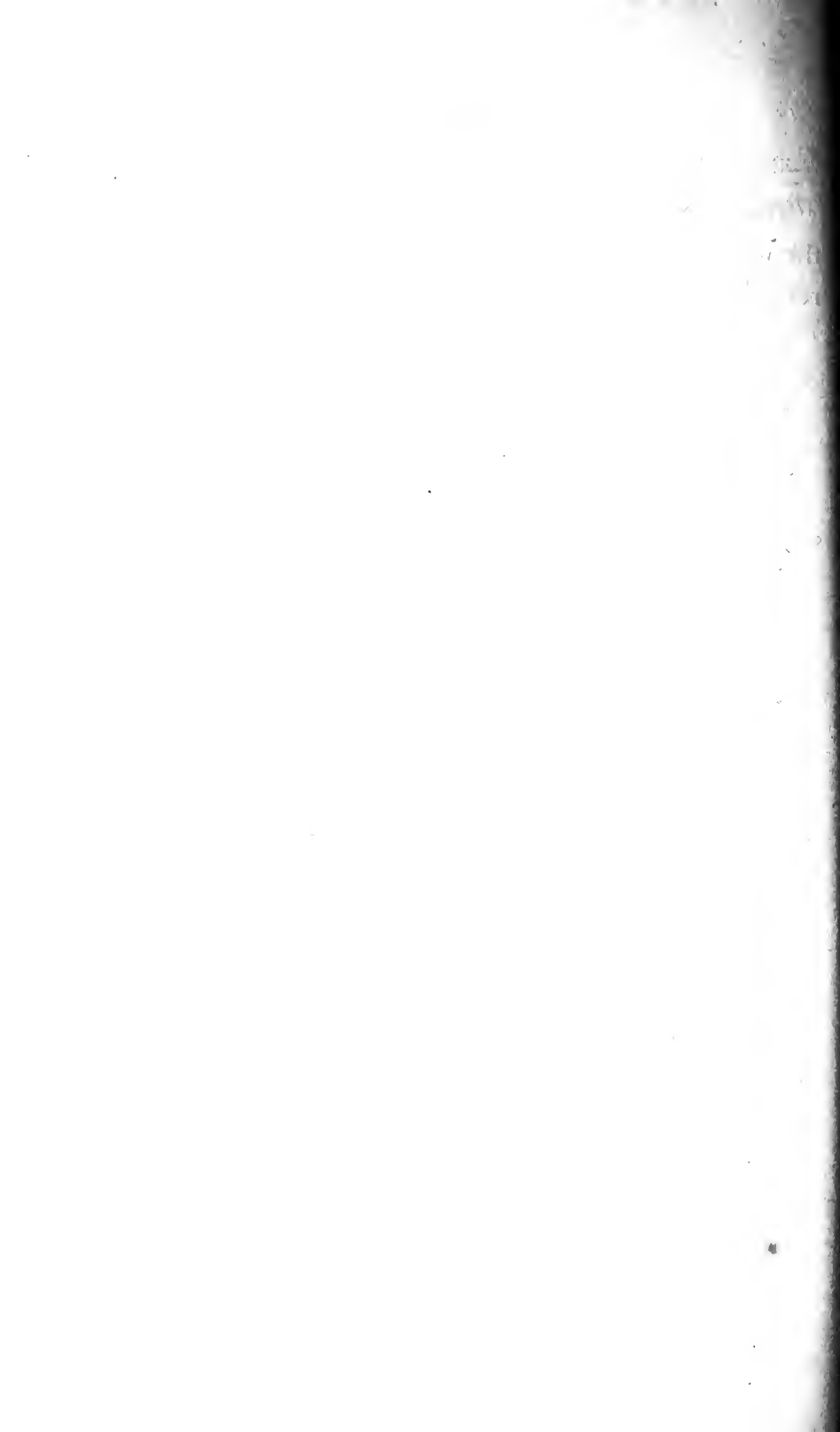
RUSSELL B. SEYMOUR,

By RUSSELL B. SEYMOUR,

*Attorneys for Appellant.*

I, Russell B. Seymour, a member of the Bar of this Court and one of the attorneys for the appellant, hereby certify that the foregoing petition for rehearing is made in good faith and without any intent to hinder or delay appellant.

RUSSELL B. SEYMOUR.



No. 12023

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United States  
**Court of Appeals**

for the Ninth Circuit

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UNITED STATES OF AMERICA,  
Appellant,  
vs.  
HONOLULU PLANTATION COMPANY,  
Appellee.  
and  
HONOLULU PLANTATION COMPANY,  
Appellant,  
vs.  
UNITED STATES OF AMERICA,  
Appellee.

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**Transcript of Record**

(In Four Volumes)

**VOLUME I**

(Pages 1 to 432)

**FILED**

DEC 31 1948

**PAUL P. O'BRIEN,**

**CLERK**

Appeal from the United States District Court  
for the District of Hawaii



No. 12023

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United States  
**Court of Appeals**  
for the Ninth Circuit

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UNITED STATES OF AMERICA,  
Appellant,  
vs.  
HONOLULU PLANTATION COMPANY,  
Appellee.  
and  
HONOLULU PLANTATION COMPANY,  
Appellant,  
vs.  
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## Austin, Stafford L.

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## Witness for Petitioner:

## Child, Jr., John Francis

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

For the Petitioner, United States of America,

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Attorney General of the United States,  
Washington, D. C.

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Department of Justice, Federal  
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For the Defendant, Honolulu Plantation Company,  
Limited,

PRATT, TAVARES & CASSIDY,

Alexander & Baldwin Building,  
Honolulu, Hawaii. [1\*]

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\* Page numbering appearing at foot of page of original  
certified Transcript of Record.

In the United States District Court for the  
District of Hawaii

Civil No. 514

UNITED STATES OF AMERICA,

Petitioner,

vs.

257.654 ACRES OF LAND, more or less, at Moana-  
lua and Halawa Oahu, Territory of Hawaii;  
et al.,

Defendants.

Civil No. 521

UNITED STATES OF AMERICA,

Petitioner,

vs.

49.058 ACRES OF LAND more or less, McGrew  
Point, Kalauao, Ewa, Oahu, Hawaii; et al.,  
Defendants.

Civil No. 525

UNITED STATES OF AMERICA,

Petitioner,

vs.

216.124 ACRES OF LAND, more or less, in Moana-  
lua, Honolulu, Oahu, Territory of Hawaii; et al.,  
Defendants.

Civil No. 527

UNITED STATES OF AMERICA,

Petitioner,

vs.

93.355 ACRES OF LAND, more or less, in Moana-  
lua, Honolulu, Oahu, Hawaii; et al.,  
Defendants. [2]

Civil No. 529

UNITED STATES OF AMERICA,

Petitioner,

vs.

344.893 ACRES OF LAND, more or less, at Manana  
and Waiwa, Ewa, Oahu, Territory of Hawaii;  
et al.,

Defendants.

Civil No. 532

UNITED STATES OF AMERICA,

Petitioner,

vs.

8.279 ACRES OF LAND, more or less, at Halawa,  
Oahu, Territory of Hawaii; et al.,

Defendants.

Civil No. 533

UNITED STATES OF AMERICA,

Petitioner,

vs.

218.349 ACRES OF LAND, more or less, at  
Waiawa Gulch, Waiawa, Oahu, Territory of  
Hawaii; et al.,

Defendants.

Civil No. 535

UNITED STATES OF AMERICA,

Petitioner,

vs.

145.848 ACRES OF LAND, more or less, situate  
at Halawa and Aiea, Ewa, Oahu, Territory of  
Hawaii; et al.,

Defendants.

Civil No. 536

UNITED STATES OF AMERICA,

Petitioner,

vs.

26.22 ACRES OF LAND, more or less, situate at  
Waiawa, Waimalu, Ewa, Oahu, Territory of  
Hawaii; et al.,

Defendants. [3]

Civil No. 540

UNITED STATES OF AMERICA,

Petitioner,

vs.

124.914 ACRES OF LAND, more or less, situate  
in Haiku Valley, Heeia, Koolaupoko, Oahu, Ter-  
ritory of Hawaii; et al.,

Defendants.

Civil No. 544

UNITED STATES OF AMERICA,

Petitioner,

vs.

317.705 ACRES OF LAND, more or less, situate  
at Moanalua, Honolulu, Oahu, Territory of  
Hawaii; et al.,

Defendants.

Civil No. 548

UNITED STATES OF AMERICA,

Petitioner,

vs.

63.725 ACRES OF LAND, more or less, situate at  
Moanalua, Honolulu, Oahu, Territory of Ha-  
wail; et al.,

Defendants.

Civil No. 684

UNITED STATES OF AMERICA,

Petitioner,

vs.

29.891 ACRES OF LAND, more or less, in Moana-  
lua and Halawa, Ewa, Oahu, Territory of Ha-  
waii; et al.,

Defendants.

### CLERK'S STATEMENT

Time of Commencing Trial: December 2, 1946.  
As consolidated. [4]

Names of Original Parties at Trial: United  
States of America, Petitioner; Honolulu Planta-  
tion Company, Limited, Defendant.

#### Dates of Filing Pleadings:

Civil No. 514: June 21, 1944, Petition for Con-  
demnation; February 10, 1945, Declaration of Tak-  
ing, Order and Judgment on Declaration of Tak-  
ing; February 17, 1945, Answer of Honolulu Plan-  
tation Company.

Civil No. 521: July 17, 1944, Petition for Con-  
demnation, Declaration of Taking, Order and Judg-  
ment on Declaration of Taking; August 7, 1944, An-  
swer of Honolulu Plantation Company; October 30,  
1945, Amended Declaration of Taking, Order and  
Judgment on Amended Declaration of Taking.

Civil No. 525: August 10, 1944, Petition for Con-  
demnation; November 2, 1944, Answer of Hono-  
lulu Plantation Company; February 10, 1945, Dec-  
laration of Taking, Order and Judgment on Decla-  
ration of Taking.

Civil No. 527: August 28, 1944, Petition for Condemnation; March 9, 1945, Declaration of Taking, Order and Judgment on Declaration of Taking; June 18, 1946, Answer of Honolulu Plantation Company. [5]

Civil No. 529: September 7, 1944, Petition for Condemnation; September 17, 1945, Declaration of Taking, Motion for Order Amending Petition in Condemnation, Order Amending Petition in Condemnation, Order and Judgment on Declaration of Taking.

Civil No. 532: September 16, 1944, Petition for Condemnation.

Civil No. 533: September 21, 1944, Petition for Condemnation; August 13, 1945, Declaration of Taking, Motion for Order Amending Petition, Order Amending Petition, Order and Judgment on Declaration of Taking.

Civil No. 535: October 11, 1944, Petition for Condemnation; August 27, 1945, Declaration of Taking, Motion for Order Amending Petition in Condemnation, Order Amending Petition in Condemnation, Order and Judgment on Declaration of Taking.

Civil No. 536: October 20, 1944, Petition for Condemnation; February 27, 1945, Motion for Order Amending Petition in Condemnation; February 28, 1945, Order Amending Petition in Condemnation; August 20, 1945, Declaration of Taking, Motion for Order Amending Petition in Condemnation, Order Amending Petition in Condemnation, Order and

Judgment on Declaration of Taking; [6] June 18, 1946, Answer of Honolulu Plantation Company.

Civil No. 540: October 30, 1944, Petition for Condemnation; October 5, 1945, Declaration of Taking, Motion for Order Amending Petition in Condemnation, Order Amending Petition in Condemnation, Order and Judgment on Declaration of Taking; June 18, 1946, Answer of Honolulu Plantation Company.

Civil No. 544: November 28, 1944, Petition for Condemnation; January 29, 1945, Declaration of Taking, Order and Judgment on Declaration of Taking.

Civil No. 548: January 18, 1945, Petition for Condemnation; November 1, 1945, Declaration of Taking, Motion for Order Amending Petition in Condemnation, Order Amending Petition in Condemnation, Order and Judgment on Declaration of Taking.

Civil No. 684: December 6, 1945, Petition for Condemnation, Declaration of Taking, Order and Judgment on Declaration of Taking; April 22, 1946, Motion for Order Amending Petition and Order and Judgment on Declaration of Taking; [7] April 22, 1946, Order Amending Petition and Order and Judgment on Declaration of Taking; June 18, 1946, Answer of Honolulu Plantation Company.

Civil Nos. 514, 525, 529, 533, 535, 544, and 548: February 17, 1945, Motion for Consolidation, Affidavit of Consolidation, Stipulation for Consolidation, Order for Consolidation, Stipulation, Judgment

ment; February 19, 1945, Satisfaction of Judgment.

Civil Nos. 514, 521, 525, 527, 529, 532, 533, 535, 536, 540, 544, 548, and 684: October 9, 1946, Motion for Consolidation; November 6, 1946, Motion for Bill of Particulars; November 22, 1946, Order for Consolidation; August 22, 1947, Decision; November 5, 1947, Judgment.

Times When Proceedings Were Had: As Consolidated—November 14, 1946, Motion for consolidation granted; November 26, 1946, Motion for bill of particulars denied; December 2, 3, 5, 6, 9, 10, 11, 12, 19, 20, 1946, January 6, 8, 9, 10, 14, and 15, 1947, Trial.

Proceedings in the above entitled matter were had before the Honorable J. Frank McLaughlin, District Judge, District of Hawaii. [8]

Dates of Filing Appeal Documents: February 3, 1948, Notice of Appeal, Notice of Cross-Appeal to Circuit Court of Appeals from Part of Judgment: February 26, 1948, Order Extending Time to Docket Record on Appeal (U.S.); March 4, 1948, Order Extending Time to Docket Record on Appeal (Hono. Plan.); March 5, 1948, Statement of Points on Appeal, Designation of Record on Appeal; March 15, 1948, Statement of Points on Cross-Appeal, Designation by Cross-Appellant of Additional Portions of Record on Appeal; March 19, 1948, Stipulation (re appeal), Order (re appeal), Bond for Costs on Appeal; July 7, 1948, Order for Transmittal of Original Exhibits.

CERTIFICATE OF CLERK TO THE ABOVE  
STATEMENT

United States of America,  
District of Hawaii—ss:

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the trial of the above-entitled causes, the names of the original parties at trial, the dates when the respective pleadings were filed, the times when proceedings were had as consolidated, the name of the judge [9] presiding, and the dates when appeal pleadings were filed in the above-entitled causes.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 4th day of August, 1948.

(Seal)           /s/ WM. F. THOMPSON, JR.,  
Clerk, United States District Court, District of  
Hawaii. [10]

In the District Court of the United States for the  
District of Hawaii

April Term, 1944

Civil No. 514

UNITED STATES OF AMERICA,

Petitioner,

vs.

257.654 ACRES OF LAND, more or less, at Moanalua and Halawa, Oahu, Territory of Hawaii; Charles Maner Hite, Trustee under the Will and of the Estate of Emma Kaleleonalani, deceased; John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear, John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased; Honolulu Plantation Company; The Hawaiian Electric Company, Limited, a Hawaiian corporation; Samuel Renny Damon; City and County of Honolulu and Territory of Hawaii,

Defendants.

### PETITION FOR CONDEMNATION

To the Honorable, the Presiding Judges of the  
United States District Court for the District of  
Hawaii:

Now comes the United States of America, by Charles F. Rathbun, Special Assistant to the Attorney General, acting under the instructions of the Attorney General of the United States and at the request of the Secretary of Navy of the United States, and respectfully represents to the Court:

## I.

That this proceeding is instituted under the authority of divers and sundry Acts of Congress, among them the following:

The Act of Congress approved March 27, 1942 (Public Law 507—77th Congress)

The Act of Congress approved April 28, 1942 (Public Law 528—77th Congress)

and that the Secretary of Navy, acting under authority vested in him by law and pursuant to law, has determined that it is necessary to acquire for the United States of America by condemnation, under judicial process, certain land more particularly described in Exhibits "A" and "B", hereto annexed and made a part hereof as though set forth at length. [12]

## II.

That the land sought to be condemned is located at Moanalua and Halawa, Oahu, Territory of Hawaii, and lies wholly within the jurisdiction of the United States District Court for the Territory of Hawaii, together with all improvements thereon and appurtenances thereunto belonging, as described in said Exhibits "A" and "B".

## III.

That attached hereto and made parts hereof are maps or plats marked Exhibits "C" and "D", delineating said property.

## IV.

That the interest sought to be condemned is the full fee simple title to said land and all improve-

ments thereon and appurtenances thereunto belonging, subject to public utility, pipe line and irrigation and drainage easements, if any.

V.

That the said land and improvements thereon and appurtenances thereunto belonging are to be acquired under the authority of and for the purposes set forth in the various Acts of Congress hereinabove mentioned, and particularly for use in connection with Officers' Housing Area and for Enlisted Men's Housing Area.

VI.

That Charles Maner Hite, Trustee under the Will and of the Estate of Emma Kaleleonalani, deceased; John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear, John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased; Honolulu Plantation Company; The Hawaiian Electric Company, Limited, a Hawaiian corporation; Samuel Renny Damon; City and County of Honolulu and Territory of Hawaii are the owners of or claim to have some interest in said land.

Petitioner herein by naming any person, company or corporation as a defendant herein does not concede that said person, company or corporation has any right, title, estate or interest in or to the land described, nor does the petitioner concede the title, claim or interest of any of said persons, companies or corporations against any other person, company or corporation, but prays the determination [13] of the interest, title, estate, lien, claim or

charge of any and all such persons, companies or corporations, including that of the petitioner, by the Court according to law.

That the Secretary of Navy of the United States has determined that the utmost haste in expediting this project is vital to the War purposes of the United States and he has therefore determined that immediate possession of said land and all improvements thereon and appurtenances thereunto belonging, to the extent of the interest to be acquired therein, is necessary by the United States and that certain and adequate provisions have been made for the payment of just compensation which may be adjudged due for the condemnation of the land described in said Exhibits "A", "B", "C" and "D".

Wherefore, your petitioner prays this Honorable Court to take jurisdiction of this cause and to make and enter all orders, judgments and decrees necessary to determine title of said real estate condemned, or any part thereof; and to fix and determine the just compensation due for the condemnation of the aforesaid lands; that the Court adjudge and determine that the immediate possession of said lands be taken to the extent of the interest being acquired herein for the War and Naval purposes of the United States; that upon payment into the registry of this Court for the United States for the use of the persons entitled thereto of the sum adjudged to be full compensation for the said condemnation of said land, that title to said land be vested in the United States of America in fee simple; and that the Court make

distribution of the final awards among the persons entitled thereto as expeditiously as may be and for such other and further relief as to the Court may seem just and proper in the premises.

UNITED STATES OF  
AMERICA,

By /s/ CHARLES F. RATHBUN,  
Special Assistant to the Attorney  
General.

(Duly Verified.) [14]

EXHIBIT "A"

Being portions of Lots E, F, J, W and G of Land Court Application 1074; a portion of Lot 1-A of Land Court Application 966 at Moanalua, Honolulu and Halawa, Ewa, Island of Oahu, T. H.

Beginning at a point on the Westerly boundary between the Lands of Moanalua (Land Court Application 1074) and Halawa (Land Court Application 966) and the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 4299.39 feet South and 8022.07 feet West, and thence running by azimuths measured clockwise from True South:

1. 165° 23'—70.80 feet along the remainder of Lot 1-A of Land Court Application 966;
2. 128° 23'—41.45 feet along the remainder of Lot 1-A of Land Court Application 966;

3.  $192^{\circ} 58' 30''$ —63.81 feet along the remainder of Lot 1-A of Land Court Application 966;
4.  $202^{\circ} 50'$ —58.50 feet along the remainder of Lot 1-A of Land Court Application 966;
5.  $211^{\circ} 49'$ —155.60 feet along the remainder of Lot 1-A of Land Court Application 966;
6.  $198^{\circ} 13' 30''$ —170.52 feet along the remainder of Lot 1-A of Land Court Application 966;
7.  $206^{\circ} 59' 30''$ —71.70 feet along the remainder of Lot 1-A of Land Court Application 966;
8.  $225^{\circ} 37'$ —136.35 feet along the remainder of Lot 1-A of Land Court Application 966;
9.  $240^{\circ} 49'$ —152.07 feet along the remainder of Lot 1-A of Land Court Application 966;
10.  $244^{\circ} 05' 30''$ —130.00 feet along the remainder of Lot 1-A of Land Court Application 966;
11.  $256^{\circ} 15'$ —123.90 feet along the remainder of Lot 1-A of Land Court Application 966;
12.  $248^{\circ} 48'$ —67.78 feet along the remainder of Lot 1-A of Land Court Application 966; [16]
13.  $240^{\circ} 16'$ —85.10 feet along the remainder of Lot 1-A of Land Court Application 966;
14.  $236^{\circ} 49'$ —207.40 feet along the remainder of Lot 1-A of Land Court Application 966;
15.  $249^{\circ} 49'$ —99.80 feet along the remainder of Lot 1-A of Land Court Application 966;
16.  $240^{\circ} 52'$ —45.50 feet along the remainder of Lot 1-A of Land Court Application 966;
17.  $228^{\circ} 08'$ —406.50 feet along the remainder of Lot 1-A of Land Court Application 966;
18.  $223^{\circ} 06'$ —58.23 feet along the remainder of Lot 1-A of Land Court Application 966;

19.  $215^{\circ} 31'$ —96.00 feet along the remainder of Lot 1-A of Land Court Application 966;
20.  $208^{\circ} 55'$ —189.08 feet along the remainder of Lot 1-A of Land Court Application 966;
21.  $202^{\circ} 32' 30''$ —94.55 feet along the remainder of Lot 1-A of Land Court Application 966;
22.  $190^{\circ} 33' 30''$ —79.25 feet along the remainder of Lot 1-A of Land Court Application 966;
23.  $188^{\circ} 27'$ —158.11 feet along the remainder of Lot 1-A of Land Court Application 966;
24.  $244^{\circ} 26' 30''$ —54.63 feet along the remainder of Lot 1-A of Land Court Application 966;
25.  $345^{\circ} 54' 50''$ —1998.64 feet along the Southwest side of Alternate Highway from Honolulu to Schofield (100 feet wide); being remainders of Lot 1-A of Land Court Application 966; and Lots J and F of Land Court Application 1074 and passing over the boundary between Halawa and Moanalua at 314.33 feet;
26. Thence along the Southwest side of Alternate Highway from Honolulu to Schofield (100 feet wide); being the remainder of Lot J of Land Court Application 1074, on a curve to the left with a radius of 1960.08 feet, the direct azimuth and distance being  $336^{\circ} 54' 50''$  613.25 feet;
27.  $327^{\circ} 54' 50''$ —550.90 feet along the Southwest side of Alternate Highway from Honolulu to Schofield (100 feet wide); being the remainders of Lots J and E of Land Court Application 1074; [17]
28. Thence along the Southwest side of Alternate Highway from Honolulu to Schofield (100 feet

wide); being the remainders of Lots E and J of Land Court Application 1074, on a curve to the left with a radius of 1196.28 feet, the direct azimuth and distance being  $313^{\circ} 00' 50''$ . 615.20 feet;

29.  $298^{\circ} 06' 50''$ —2628.83 feet along the Southwest side of Alternate Highway from Honolulu to Schofield (100 feet wide); being the remainder of Lot J of Land Court Application 1074;
30.  $48^{\circ} 56'$ —75.00 feet along the remainder of Lot J of Land Court Application 1074;
31.  $33^{\circ} 00'$ —170.45 feet along the remainder of Lot J of Land Court Application 1074;
32.  $11^{\circ} 46'$ —207.86 feet along the remainder of Lot J of Land Court Application 1074;
33.  $352^{\circ} 31'$ —229.25 feet along the remainder of Lot J of Land Court Application 1074;
34.  $341^{\circ} 59'$ —87.63 feet along the remainder of Lot J of Land Court Application 1074;
35.  $11^{\circ} 22'$ —113.72 feet along the remainder of Lot J of Land Court Application 1074;
36.  $31^{\circ} 41'$ —99.20 feet along the remainder of Lot J of Land Court Application 1074;
37.  $14^{\circ} 20'$ —104.92 feet along the remainder of Lot J of Land Court Application 1074;
38.  $356^{\circ} 44'$ —98.27 feet along the remainder of Lot J of Land Court Application 1074;
39.  $333^{\circ} 32'$ —111.35 feet along the remainder of Lot J of Land Court Application 1074;
40.  $80^{\circ} 55' 30''$ —325.02 feet along the remainders of Lot J and G of Land Court Application 1074;

41.  $133^{\circ} 15'$ —435.82 feet along the remainders of Lots G and W of Land Court Application 1074;
42.  $146^{\circ} 26' 30''$ —496.50 feet along the remainders of Lots W and E of Land Court Application 1074;
43.  $184^{\circ} 37'$ —129.47 feet along the remainder of Lot E of Land Court Application 1074;
44.  $161^{\circ} 45'$ —147.18 feet along the remainder of Lot E of Land Court Application 1074; [18]
45.  $57^{\circ} 25' 30''$ —432.28 feet along the remainder of Lot E of Land Court Application 1074;
46.  $115^{\circ} 38'$ —140.00 feet along the remainder of Lot E of Land Court Application 1074;
47.  $181^{\circ} 39' 30''$ —183.00 feet along the remainder of Lot E of Land Court Application 1074;
48.  $141^{\circ} 19'$ —184.71 feet along the remainder of Lot E of Land Court Application 1074;
49.  $49^{\circ} 20' 30''$ —281.42 feet along the remainder of Lot E of Land Court Application 1074;
50.  $97^{\circ} 57'$ —196.66 feet along the remainder of Lot E of Land Court Application 1074;
51.  $166^{\circ} 12'$ —241.81 feet along the remainder of Lot E of Land Court Application 1074;
52.  $182^{\circ} 36'$ —81.96 feet along the remainder of Lot E of Land Court Application 1074;
53.  $113^{\circ} 29'$ —148.57 feet along the remainder of Lot E of Land Court Application 1074;
54.  $32^{\circ} 32' 30''$ —156.57 feet along the remainder of Lot E of Land Court Application 1074;
55.  $100^{\circ} 33'$ —73.67 feet along the remainder of Lot E of Land Court Application 1074;
56.  $159^{\circ} 07'$ —143.45 feet along the remainder of Lot E of Land Court Application 1074;

57.  $52^{\circ} 01' 30''$ —238.58 feet along the remainder of Lot E of Land Court Application 1074;
58.  $64^{\circ} 19' 30''$ —162.60 feet along the remainder of Lot E of Land Court Application 1074;
59.  $133^{\circ} 50'$ —198.56 feet along the remainder of Lot E of Land Court Application 1074;
60.  $87^{\circ} 21' 30''$ —252.62 feet along the remainder of Lot E of Land Court Application 1074;
61.  $116^{\circ} 09'$ —274.03 feet along the remainder of Lot E of Land Court Application 1074;
62.  $89^{\circ} 04'$ —153.58 feet along the remainder of Lot E of Land Court Application 1074;
63.  $109^{\circ} 38' 30''$ —380.00 feet along the remainder of Lot E of Land Court Application 1074; [19]
64.  $123^{\circ} 13' 30''$ —248.58 feet along the remainder of Lot E of Land Court Application 1074;
65.  $108^{\circ} 14' 30''$ —226.57 feet along the remainder of Lot E of Land Court Application 1074;
66.  $147^{\circ} 54'$ —304.63 feet along the remainder of Lot E of Land Court Application 1074;
67.  $168^{\circ} 21' 30''$ —102.09 feet along the remainder of Lot E of Land Court Application 1074;
68.  $156^{\circ} 40'$ —238.42 feet along the remainder of Lot E of Land Court Application 1074;
69.  $140^{\circ} 04' 30''$ —385.00 feet along the remainder of Lot E of Land Court Application 1074;
70.  $159^{\circ} 20' 30''$ —440.75 feet along the remainder of Lot E of Land Court Application 1074;
71.  $173^{\circ} 39' 30''$ —173.96 feet along the remainder of Lot E of Land Court Application 1074;
72.  $162^{\circ} 51' 30''$ —299.22 feet along the remainder of Lot E of Land Court Application 1074;

73.  $133^{\circ} 35'$ —378.66 feet along the remainder of Lot E of Land Court Application 1074;
74.  $179^{\circ} 01' 30''$ —166.20 feet along the remainder of Lot E of Land Court Application 1074 to the point of beginning and containing an area of 244.065 acres.

But, subject to portions of Hawaiian Electric Company's 50-foot easement for transmission line and Easement 5 of Land Court Application 966 (5 feet wide in favor of the U. S. Army) as shown on attached plan.

WRIGHT, HARVEY &  
WRIGHT,

By /s/ FRED E. HARVEY,  
Surveyor.

Honolulu, T. H., March 2, 1944. [20]

EXHIBIT "B"

PARCEL E-1

Being a portion of Lot 1-A of Land Court Application 966 Situated at Halawa, Ewa, Oahu, T. H.

Beginning at the Northeast corner of this piece of land, the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 4165.45 feet South and 8053.97 feet West, and thence running by azimuths measured clockwise from True South:

1.  $14^{\circ} 36'$ —92.78 feet along the remainder of Lot 1-A of Land Court Application 966;

2.  $46^{\circ} 59'$ —1203.07 feet along the remainder of Lot 1-A of Land Court Application 966;
3. Thence still along the remainder of Lot 1-A of Land Court Application 966, on a curve to the right with a radius of 40.0 feet, the direct azimuth and distance being  $107^{\circ} 42' 69.78$  feet;
4.  $168^{\circ} 25'$ —385.48 feet along the East side of Kamehameha Highway;
5.  $218^{\circ} 25'$ —843.69 feet along Lot B-3-A of Land Court Application 966 (U. S. Naval Reservation);
6.  $308^{\circ} 25'$ —50.58 feet along the remainder of Lot 1-A of Land Court Application 966;
7.  $280^{\circ} 44' 30''$ —113.40 feet along the remainder of Lot 1-A of Land Court Application 966;
8.  $284^{\circ} 36'$ —384.00 feet along the remainder of Lot 1-A of Land Court Application 966 to the point of beginning and containing an area of 11.394 acres.

Subject, however, to railroad easements in favor of the Honolulu Plantation Company (15.0 feet wide) and U. S. Army (20.0 feet wide) as shown on attached plan.

WRIGHT, HARVEY &  
WRIGHT,

By /s/ FRED E. HARVEY,  
Surveyor.

Honolulu, T. H., April 7, 1944. [21]

## PARCEL E-2

Being a portion of Lot 1-A of Land Court Application 966 at Halawa, Ewa, Oahu, T. H.

Beginning at a point on the East corner of this parcel of land, on the boundary between the Lands of Moanalua (Land Court Application 1074) and Halawa (Land Court Application 966), the coordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 4299.39 feet South and 8022.07 feet West, and thence running by azimuths measured clockwise from True South:

1.  $46^{\circ} 59'$ —1327.46 feet along Lot E of Land Court Application 1074 (Pearl Harbor Naval Hospital);
2.  $168^{\circ} 25'$ —153.36 feet along the East side of Kamehameha Highway;
3. Thence along the remainder of Lot 1-A of Land Court Application 966, on a curve to the left with a radius of 40.0 feet, the direct azimuth and distance being  $287^{\circ} 42'$  69.78 feet;
4.  $226^{\circ} 59'$ —1203.07 feet along the remainder of Lot 1-A of Land Court Application 966;
5.  $194^{\circ} 36'$ —92.78 feet along the remainder of Lot 1-A of Land Court Application 966;
6.  $320^{\circ} 35'$ —31.61 feet along the remainder of Lot 1-A of Land Court Application 966;
7.  $8^{\circ} 23'$ —41.45 feet along the remainder of Lot 1-A of Land Court Application 966;
8.  $345^{\circ} 23'$ —70.80 feet along the remainder of Lot 1-A of Land Court Application 966 to the point

of beginning and containing an area of 2.195 acres.

But, subject to a portion of Easement 5 of Land Court Application 966 in favor of the U. S. Army (5.0 feet wide) as shown on attached plan.

WRIGHT, HARVEY &  
WRIGHT,

By /s/ FRED E. HARVEY,  
Surveyor.

Honolulu, T. H., April 7, 1944.

[Endorsed]: Filed June 21, 1944. [22]

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[Title of District Court and Cause No. 514.]

#### DECLARATION OF TAKING

Whereas, pursuant to the Acts of Congress approved March 27, 1942 (Public Law 507, 77th Congress), and April 28, 1942 (Public Law 528, 77th Congress), the above-styled condemnation proceeding has been instituted.

Now, Therefore, pursuant to the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), I, Secretary of the Navy, do hereby make and cause to be filed this declaration of taking, and by virtue of authority thereof do hereby state that the lands selected for acquisition aggregate 257.654 acres, more or less, at Moanalua and Halawa, Oahu, Territory of Hawaii, more particularly described in Exhibit "A" attached hereto and made a part hereof. The lands are delineated on a map entitled "Composite Boundary Map, Portions

## EXHIBIT "A"

## PARCEL E-1

Being a portion of Lot 1-A of Land Court Application 966 Situated at Halawa, Ewa, Oahu, T. H.

Beginning at the Northeast corner of this piece of land, the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 4165.45 feet South and 8053.97 feet West, and thence running by azimuths measured clockwise from True South:

1.  $14^{\circ} 36'$ —92.78 feet along the remainder of Lot 1-A of Land Court Application 966;
2.  $46^{\circ} 59'$ —1203.07 feet along the remainder of Lot 1-A of Land Court Application 966;
3. Thence still along the remainder of Lot 1-A of Land Court Application 966, on a curve to the right with a radius of 40.0 feet, the direct azimuth and distance being  $107^{\circ} 42' 69.78$  feet;
4.  $168^{\circ} 25'$ —385.48 feet along the East side of Kamehameha Highway;
5.  $218^{\circ} 25'$ —843.69 feet along Lot B-3-A of Land Court Application 966 (U. S. Naval Reservation);
6.  $308^{\circ} 25'$ —50.58 feet along the remainder of Lot 1-A of Land Court Application 966;
7.  $280^{\circ} 44' 30''$ —113.40 feet along the remainder of Lot 1-A of Land Court Application 966;
8.  $284^{\circ} 36'$ —384.00 feet along the remainder of Lot 1-A of Land Court Application 966 to the

point of beginning and containing an area of 11.394 acres.

Subject, however, to railroad easements in favor of the Honolulu Plantation Company (15.0 feet wide) and U. S. Army (20.0 feet wide) as shown on attached plan. [29]

### PARCEL E-2

Being a portion of Lot 1-A of Land Court Application 966 at Halawa, Ewa, Oahu, T. H.

Beginning at a point on the East corner of this parcel of land, on the boundary between the Lands of Moanalua (Land Court Application 1074) and Halawa (Land Court Application 966), the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 4299.39 feet South and 8022.07 feet West, and thence running by azimuths measured clockwise from True South:

1.  $46^{\circ} 59'$ —1327.46 feet along Lot E of Land Court Application 1074 (Pearl Harbor Naval Hospital);
2.  $168^{\circ} 25'$ —153.36 feet along the east side of Kamehameha Highway;
3. Thence along the remainder of Lot 1-A of Land Court Application 966, on a curve to the left with a radius of 40.0 feet, the direct azimuth and distance being  $287^{\circ} 42'$  69.78 feet;
4.  $226^{\circ} 59'$ —1203.07 feet along the remainder of Lot 1-A of Land Court Application 966;
5.  $194^{\circ} 36'$ —92.78 feet along the remainder of Lot 1-A of Land Court Application 966;

6.  $320^{\circ} 35'$ —31.61 feet along the remainder of Lot 1-A of Land Court Application 966;
7.  $8^{\circ} 23'$ —41.45 feet along the remainder of Lot 1-A of Land Court Application 966;
8.  $345^{\circ} 23'$ —70.80 feet along the remainder of Lot 1-A of Land Court Application 966 to the point of beginning and containing an area of 2.195 acres.

But, subject to a portion of Easement 5 of Land Court Application 966 in favor of the U. S. Army (5.0 feet wide) as shown on attached plan. [30]

#### PARCELS E-3 and D-1

Being portions of Lots E, F, J, W and G of Land Court Application 1074 and a portion of Lot 1-A of Land Court Application 966.

At Moanalua, Honolulu and Halawa, Ewa, Island of Oahu, T. H.

Beginning at a point of the Westerly boundary between the Lands of Moanalua (Land Court Application 1074) and Halawa (Land Court Application 966) and the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 4299.39 feet South and 8022.07 feet West, and thence running by azimuths measured clockwise from True South:

1.  $165^{\circ} 23'$ —70.80 feet along the remainder of Lot 1-A of Land Court Application 966, (along Parcel E-2);
2.  $188^{\circ} 23'$ —41.45 feet along the remainder of Lot

1-A of Land Court Application 966, along Parcel E-2;

[Printer's Note: Balance of Exhibit "A" (description of Parcels E-3 and D-1) attached to Declaration of Taking is similar to Exhibit "A" attached to the Petition for Condemnation and printed at pages 14 to 20.]

[Endorsed]: Filed Feb. 10, 1945. [35]

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In the District Court of the United States  
for the District of Hawaii

Civil No. 514

UNITED STATES OF AMERICA,

Petitioner,

vs.

257.654 ACRES OF LAND, more or less, at Moanalua and Halawa, Oahu, Territory of Hawaii;  
CHARLES MANER HITE, Trustee under the Will and of the Estate of Emma Kaleleonalani, deceased; et al.,

Defendants.

ORDER AND JUDGMENT ON DECLARATION  
OF TAKING

It appearing that on the 21st day of June, 1944, the United States of America filed a petition for condemnation of certain lands described and shown on Exhibits "A" and "B" attached to Declaration of Taking; and

6.  $320^{\circ} 35'$ —31.61 feet along the remainder of Lot 1-A of Land Court Application 966;
7.  $8^{\circ} 23'$ —41.45 feet along the remainder of Lot 1-A of Land Court Application 966;
8.  $345^{\circ} 23'$ —70.80 feet along the remainder of Lot 1-A of Land Court Application 966 to the point of beginning and containing an area of 2.195 acres.

But, subject to a portion of Easement 5 of Land Court Application 966 in favor of the U. S. Army (5.0 feet wide) as shown on attached plan. [30]

#### PARCELS E-3 and D-1

Being portions of Lots E, F, J, W and G of Land Court Application 1074 and a portion of Lot 1-A of Land Court Application 966.

At Moanalua, Honolulu and Halawa, Ewa, Island of Oahu, T. H.

Beginning at a point of the Westerly boundary between the Lands of Moanalua (Land Court Application 1074) and Halawa (Land Court Application 966) and the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 4299.39 feet South and 8022.07 feet West, and thence running by azimuths measured clockwise from True South:

1.  $165^{\circ} 23'$ —70.80 feet along the remainder of Lot 1-A of Land Court Application 966, (along Parcel E-2);
2.  $188^{\circ} 23'$ —41.45 feet along the remainder of Lot

1-A of Land Court Application 966, along Parcel E-2;

[Printer's Note: Balance of Exhibit "A" (description of Parcels E-3 and D-1) attached to Declaration of Taking is similar to Exhibit "A" attached to the Petition for Condemnation and printed at pages 14 to 20.]

[Endorsed]: Filed Feb. 10, 1945. [35]

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In the District Court of the United States  
for the District of Hawaii

Civil No. 514

UNITED STATES OF AMERICA,

Petitioner,

vs.

257.654 ACRES OF LAND, more or less, at Moanalua and Halawa, Oahu, Territory of Hawaii;  
CHARLES MANER HITE, Trustee under the Will and of the Estate of Emma Kaleleonalani, deceased; et al.,

Defendants.

ORDER AND JUDGMENT ON DECLARATION  
OF TAKING

It appearing that on the 21st day of June, 1944, the United States of America filed a petition for condemnation of certain lands described and shown on Exhibits "A" and "B" attached to Declaration of Taking; and

It further appearing that there was filed on the 10th day of February, 1945, a Declaration of Taking signed by James Forrestal, Secretary of the Navy, under and pursuant to provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), declaring taken the full fee simple title, together with all improvements thereon and appurtenances thereunto belonging, as limited in the Declaration of Taking; that the uses of said land and improvements thereon and appurtenances thereunto belonging are those described in the said Declaration of Taking and in the Petition; and that the said Declaration of Taking sets forth the estimate of just compensation made pursuant to law and that contemporaneously with the filing of said Declaration of Taking, there was deposited in the registry of this Court for the use of the persons entitled thereunto the sum of one hundred eight thousand, nine hundred seventy-two dollars and ten cents (\$108,972.10), [37]

It Is Ordered, Adjudged and Decreed that by virtue of the filing of said Declaration of Taking and the deposit of said money, fee simple title to the lands described and shown on Exhibits "A" and "B", attached to said Declaration of Taking, including all improvements and appurtenances upon said lands, as limited by the said Declaration of Taking, is indefeasibly vested in the United States of America; and

It Is Further Ordered that a copy of this Order be promptly served by the United States Marshal upon each of the defendants named and upon each

and every person, company or corporation in possession of said land at the time possession was surrendered to the petitioner. The Marshal is further ordered to post a copy hereof in a conspicuous place on the premises and to forthwith make due return of his said service to this Court.

Dated: Honolulu, T. H., this 10th day of February, 1945.

/s/ J. FRANK McLAUGHLIN,  
Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed Feb. 10, 1945. [38]

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[Title of District Court and Causes Nos. 514, 525,  
529, 533, 535, 544, 548.]

ANSWER OF HONOLULU PLANTATION  
COMPANY

Comes now Honolulu Plantation Company, a corporation organized under the laws of the State of California and doing business in the Territory of Hawaii, one of the defendants in each of the above entitled causes and for consolidated answer to each of the petitions which have been filed in these consolidated causes, says:

I.

That it admits the allegations contained in para-

graphs I of the petitions heretofore filed in said causes insofar as they allege that the United States has power to condemn the property which it is seeking to take but insofar as the other allegations contained therein are concerned denies that it has knowledge or information sufficient to form a belief as to the allegations therein set forth and therefore neither admits nor denies the same but leaves the petitioner to its proof thereof.

## II.

That except as hereinafter admitted it denies that it has knowledge or information sufficient to form a belief as to the allegations set forth and contained in paragraphs II to V, II to VI and II to VII of said petitions and therefore it neither admits or denies the same but leaves the petitioner to its proof thereof; [40]

## III.

That with respect to the allegations in each of said petitions that it claims an interest in the property described in said petition this defendant admits the same and alleges that at the time of the filing of said petitions and until judgments or orders were entered on declaration of taking filed in said causes it was the owner of an interest in the lands and in some of the improvements thereon and also admits that its various lessors have an interest in the lands described in said petition which are under lease to this defendant that the various leases creating interests and estates will be submitted to the Court on the trial of said causes.

And this defendant further alleges as follows:

That for and during a period of over forty years this defendant has been continuously operating and conducting and is now conducting and operating a sugar mill and plantation at Aiea in the District of Ewa, Island of Oahu, T. H., and has at all times during said period been and now is engaged in the business of growing sugar cane and manufacturing sugar therefrom;

That of the total acreage of land taken are, by reason of the fertility of the soil thereon, their low elevation, and the comparatively small expense with which they can be irrigated, peculiarly adapted to the cultivation and growth of sugar cane, and that this defendant was at the time of the filing of the petitions in these various causes and until the dates fixed for the surrendering of possession by the judgments or orders on the Declaration of Taking entered in these causes and for many years prior thereto had been profitably using said lands for the cultivation and growth of sugar cane;

That the lands included within the parcels of land sought to be condemned which are held by this defendant under lease as aforesaid have a special and enhanced value by reason of the establishment by this defendant of a sugar mill and works, in close proximity to said lands, for the manufacture of sugar cane grown and cultivated thereon and on other lands owned and/or leased by this defendant and by reason of the development of a water supply for the irrigation of said lands, and other lands

as aforesaid by means of artesian wells, pumping machinery and otherwise; [41]

That for the purpose of cultivating the said lands, this defendant has at great expense constructed improvements thereon in some of which it owned an interest at the time it surrendered its possession of said lands pursuant to the judgments or orders entered on the Declaration of Taking filed in these causes;

That the parcels of land sought to be condemned by said petitions in which this defendant has leasehold interests were at the times of the filing of the various petitions in these consolidated causes and until judgments or orders were entered on Declaration of Taking filed in these causes, and for many years prior thereto had been, occupied and cultivated by this defendant as integral parts of the sugar plantation operated and conducted by it at Aiea aforesaid and in connection with other large and contiguous tracts situated outside of the lands described in said petitions but comprised within the said plantation and demised to this defendant by a number of leases and that by the taking of said lands described in the said petitions **the integrity** of said sugar plantation will be destroyed and the unitary value of the leasehold interests and estates of this defendant in such other and contiguous tracts of land will be greatly impaired and diminished:

Wherefore this defendant prays (1) that the damages suffered by this defendant by reason of the taking of the lands and properties described in

said petitions may be determined and the amount thereof be awarded to and paid to this defendant, and (2) for such other and general relief as may be meet and proper in the premises.

Dated: Honolulu, T. H., February 17, 1945.

HONOLULU PLANTATION  
COMPANY,

By /s/ STANLEY, VITOUSEK,  
PRATT AND WINN,

Its Attorneys.

Defendants above named.

[Endorsed]: Filed Feb. 17, 1945. [42]

*United States of America vs.*

In the District Court of the United States  
for the District of Hawaii

April Term 1944

Civil No. 521

UNITED STATES OF AMERICA,

Petitioner,

vs.

49.058 ACRES OF LAND, more or less, McGrew  
Point, Kalauao, Ewa, Oahu, Hawaii, and  
KATHARINE MCGREW COOPER, et al.,  
Defendants.

PETITION FOR CONDEMNATION

To the Honorable, the Presiding Judges of the  
United States District Court for the District of  
Hawaii:

Now comes the United States of America, by  
Charles F. Rathbun, Special Assistant to the At-  
torney General, acting under the instructions of the  
Attorney General of the United States and at the  
request of the Secretary of Navy of the United  
States and respectfully represents to the Court:

I.

That this proceeding is instituted under the au-  
thority of divers and sundry Acts of Congress,  
among them the following:

The Act of Congress approved February 26,  
1931 (46 Stat. 1421), and acts supplementary  
thereto and amendatory thereof;

The Act of Congress approved March 27, 1942 (Public Law 507 - 77th Congress);

The Act of Congress approved January 28, 1944 (Public Law 224 - 78th Congress)

and that the Secretary of Navy, acting under authority vested in him by law, has determined that it is necessary and advantageous to acquire for the United States by condemnation, under judicial process, certain land more particularly described in Exhibit "A", hereto annexed and made a part hereof as though set forth at length.

## II.

That the land sought to be condemned is located at McGrew Point, Kalauao, Ewa, Oahu, Territory of Hawaii, and lies wholly within the jurisdiction of the United States District Court for the District of Hawaii, together with all improvements thereon and appurtenances thereunto belonging as described [44] in said Exhibit "A".

## III.

That attached hereto and made a part hereof is a map or plat marked Exhibit "B", delineating said property.

## IV.

That the interest sought to be condemned is the full fee simple title to said land and all improvements thereon and appurtenances thereunto belonging; subject to existing public utility easements.

## V.

That the land is to be acquired for use to provide for the establishment of Base Hospital No. 8 for Mobile Hospital Unit, and said land is required for immediate use, and that the Secretary of Navy,

pursuant to law, has selected the land described Exhibit "A" as necessary to be acquired by the United States of America for the uses and purposes aforesaid;

## VI.

That contemporaneously herewith there has been filed a Declaration of Taking and a deposit made of certain funds, therein described and allocated, all pursuant to the Acts of Congress in such case made and provided.

## VII.

That the petitioner has been in the actual and exclusive possession of said premises mentioned in said Exhibits "A" and "B", hereto attached, continuously from and after the following dates to the present time:

Parcel Number	Date of Possession
1A .....	September 1, 1943
1B .....	December 1, 1943
2A and 2B .....	September 28, 1943
3A, 3B, 3C and 4.....	October 1, 1943

## VIII.

That Katharine McGrew Cooper; Honolulu Plantation Company; A. Lester Marks, Elizabeth Loy Marks and Elizabeth Janet Cartwright McCandless, Trustees under the Will and of the Estate of Lincoln Loy McCandless, deceased; Aima N. Aluli, Auwae L. Aluli and Noa T. Aluli, Trustees under the Will and of the Estate of Noa W. Aluli; Oahu Railway and Land Company, a corporation; may have or claim to have some interest in said land and that there are or may be certain persons, com-

panies or corporations owning, having or claiming some [45] right, title, estate, interest, lien, encumbrance, claim or charge in, to or upon the land condemned, which said persons, companies or corporations are unknown to the petitioner and are designated as "Unknown Owners" and as John Does One to Fifty and Mary Roes One to Fifty, and are named as defendants in this proceeding.

Wherefore, your petitioner prays this Honorable Court to take jurisdiction of this cause and to make and enter all orders, judgments and decrees necessary to determine title to said real estate condemned, or any part thereof; and to fix and determine the just compensation due for the condemnation of the land aforesaid; and to do any and all things necessary or required to vest in the United States of America a fee simple title in and to the land described in said Exhibit "A" to the exclusion of any and all persons, companies or corporations, subject to existing public utility easements; and to make distribution of the final awards and the amount of the deposit among those persons entitled thereto as expeditiously as may be; and to confirm the actual possession of the said premises by the petitioner as of the dates hereinabove set forth; and for such other and further relief as to the Court may seem just and proper in the premises.

UNITED STATES OF  
AMERICA,

By /s/ CHARLES F. RATHBUN,  
Special Assistant to the  
Attorney General.

(Duly Verified) [46]

## EXHIBIT "A"

## Parcel 1-A

Katharine McGrew Cooper

Description of Lots 1-A, 1-B, 1-C and a portion of Lot 1-D of Land Court Application 334 Situated along the South Side of Oahu Railway and Land Company's right-of-way at Paaiau and Kapuai, Kalauao, Ewa, Oahu, T. H.

Beginning at a point at highwater mark, the coordinates of said point of beginning referred to a concrete monument being the initial point of Land Court Application 334 being 21.81 feet North and 292.49 feet West and the true azimuth and distance from said concrete monument to Government Survey Triangulation Station "Salt Lake" being  $297^{\circ} 59' 30''$  1008.67 feet, and thence running by azimuths measured clockwise from true South:

1.  $73^{\circ} 55'$ —33.03 feet along highwater mark;
2.  $52^{\circ} 00'$ —164.80 feet along highwater mark;
3.  $35^{\circ} 30'$ —100.00 feet along highwater mark;
4.  $58^{\circ} 00'$ —200.00 feet along highwater mark;
5.  $94^{\circ} 30'$ —160.00 feet along highwater mark;
6.  $90^{\circ} 00'$ —100.00 feet along highwater mark;
7.  $71^{\circ} 40'$ —100.00 feet along highwater mark;
8.  $53^{\circ} 10'$ —300.00 feet along highwater mark;
9.  $38^{\circ} 30'$ —100.00 feet along highwater mark;
10.  $18^{\circ} 40'$ —150.00 feet along highwater mark;
11.  $32^{\circ} 50'$ —198.00 feet along highwater mark;
12.  $131^{\circ} 10'$ —260.00 feet along highwater mark;
13.  $118^{\circ} 30'$ —403.00 feet along highwater mark;

14.  $132^{\circ} 20'$ —170.00 feet along highwater mark;
15.  $158^{\circ} 30'$ —100.00 feet along highwater mark;
16.  $186^{\circ} 50'$ —280.00 feet along highwater mark;
17.  $203^{\circ} 20'$ —100.00 feet along highwater mark;
18.  $214^{\circ} 50'$ —130.00 feet along highwater mark;
19.  $189^{\circ} 20'$ —100.00 feet along highwater mark;
20.  $161^{\circ} 50'$ —200.00 feet along highwater mark;
21.  $146^{\circ} 00'$ —150.00 feet along highwater mark;
22.  $220^{\circ} 00'$ —221.70 feet along Grant 171 to Kuaana and passing over a concrete monument at 17.60 feet, and passing over another concrete monument at 195.30 feet;
23.  $296^{\circ} 00'$ —65.30 feet along Grant 171 to Kuaana to a concrete monument;
24.  $284^{\circ} 00'$ —140.60 feet along Grant 171 to Kuaana to a concrete monument;
25.  $225^{\circ} 30'$ —99.00 feet along Grant 171 to Kuaana to a concrete monument;
26.  $183^{\circ} 10'$ —31.70 feet along Grant 171 to Kuaana to a concrete monument;
27.  $248^{\circ} 20'$ —58.20 feet along Grant 171 to Kuaana to a concrete monument;
28.  $277^{\circ} 35'$ —198.50 feet along the South side of Oahu Railway and Land Company's right-of-way;
29.  $324^{\circ} 40'$ —558.00 feet along Grant 171 to Kuaana and R. P. 743, I. C. Aw. 7450-B to Kaiaka;
30.  $221^{\circ} 30'$ —270.00 feet along R. P. 743, I. C. Aw. 7450-B to Kaika and Grant 169 to William E. Gill;
31.  $225^{\circ} 28'$ —227.40 feet along Grant 169 to William E. Gill and Grant 171 to Kuaana;

32. Thence along the South side of Oahu Railway and Land Company's right-of-way, on a curve to the right with a radius of 1402.69 feet, the direct azimuth and distance being  $283^{\circ} 39' 30''$  307.2 feet;
33.  $19^{\circ} 57'$ —10.00 feet along Oahu Railway and Land Company's right-of-way; [48]
34. Thence along the South side of Oahu Railway and Land Company's right-of-way, on a curve to the right with a radius of 1392.69 feet, the direct azimuth and distance being  $293^{\circ} 50' 30''$  189.04 feet;
35.  $48^{\circ} 00'$ —32.03 feet along the remainder of Lot 1-D of Land Court Application 334;
36.  $300^{\circ} 48'$ —167.96 feet along the remainder of Lot 1-D of Land Court Application 334;
37.  $312^{\circ} 16' 30''$ —101.13 feet along the remainder of Lot 1-D of Land Court Application 334;
38. Thence along the remainder of Lot 1-D of Land Court Application 334, on a curve to the right with a radius of 136.08 feet, the direct azimuth and distance being  $19^{\circ} 20'$  126.09 feet;
39.  $46^{\circ} 56'$ —132.00 feet along the remainder of Lot 1-D of Land Court Application 334;
40.  $342^{\circ} 00'$ —151.60 feet to the point of beginning and containing a gross area of 45.427 Acres; exclusive of R. P. 114, L. C. Aw. 5878, Apana 1 to Kukiiahu (0.697 Acre), R. P. 114, L. C. Aw 5878, Apana 2 to Kukiiahu (0.443 Acre), owned by the Aluli Estate; R. P. 6428, L. C. Aw. 5669, Apana 1 to Kupihea (0.470 acre) R. P. 6428, L. C. Aw. 5669, Apana 2 to Kupihea

(0.107 Acre) owned by the Honolulu Plantation Company, leaving a net area of 43.710 Acres.

WRIGHT, HARVEY &  
WRIGHT,

By /s/ FRED E. HARVEY,  
Surveyor.

Honolulu, T. H., October 29, 1943. [49]

Parcel 2-A

Honolulu Plantation Company

Being R. P. 6428, L. C. Aw. 5669, Apana 1 to Kupihea, situated near the South side of Oahu Railway and Land Company's right-of-way, at Paaiau, Kalauao, Ewa, Oahu, T. H.

Beginning at a concrete monument at the North corner of this piece of land, said point of beginning being also the end of Course 26 of Land Court Application 334, and thence running by azimuths measured clockwise from True South:

1.  $324^{\circ} 30'$ —594.00 feet along Lot 1-B of Land Court Application 334;
2.  $68^{\circ} 42'$ —38.50 feet along Lot 1-B of Land Court Application 334;
3.  $147^{\circ} 00'$ —143.90 feet along Lot 1-B of Land Court Application 334;
4.  $142^{\circ} 00'$ —138.60 feet along Lot 1-B of Land Court Application 334;
5.  $195^{\circ} 00'$ —17.80 feet along Lot 1-B of Land Court Application 334;

6.  $129^{\circ} 00'$ —66.00 feet along Lot 1-B of Land Court Application 334;
7.  $146^{\circ} 40'$ —222.40 feet along Lot 1-B of Land Court Application 334;
8.  $225^{\circ} 30'$ —33.00 feet along Grant 171 to Kuaana to the point of beginning and containing an area of 20,465 square feet or 0.47 acre.

WRIGHT, HARVEY &  
WRIGHT,

By /s/ FRED E. HARVEY,  
Surveyor.

Honolulu, T. H., October 29, 1943. [50]

Parcel 3-A

Aluli Estate

Being R. P. 743, L. C. Aw. 7450-B to Kaiaka, situated near the South side of Oahu Railway and Land Company's right-of-way, at Paaiau, Kalauao, Ewa, Oahu, T. H.

Beginning at the South corner of this piece of land, being also the South corner of R. P. 743, L. C. Aw. 7450-B to Kaiaka and the North corner of R. P. 114, L. C. Aw. 5878, Apana 2 to Kukiiahu, said point of beginning being also the end of Course 30 of Land Court Application 334, and thence running by azimuths measured clockwise from True South:

1.  $144^{\circ} 40'$ —470.00 feet along Lot 1-B of Land Court Application 334 and R. P. 114, L. C. Aw. 5878, Apana 1 to Kukiiahu;

2.  $265^{\circ} 40'$ —118.00 feet along Grant 171 to Kuaana;
3.  $304^{\circ} 46'$ —378.04 feet along Grant 169 to William E. Gill;
4.  $41^{\circ} 30'$ —236.00 feet along Lot 1-B of Land Court Application 334 to the point of beginning and containing an area of 1.558 acres, more or less.

Compiled by:

WRIGHT, HARVEY &  
WRIGHT,

By /s/ FRED E. HARVEY,  
Surveyor.

Honolulu, T. H., November 3, 1943. [51]

Parcel 1-B

Katharine McGrew Cooper

Being Lot 3-A of Land Court Application 334, situated between the Southwest side of Kamehameha Highway and the Northeast side of Oahu Railway and Land Company's right-of-way, at Paaiau, Kalauao, Ewa, Oahu, T. H.

Beginning at the Southwest corner of this piece of land and on the Northeast side of Oahu Railway and Land Company's right-of-way, and thence running by azimuths measured clockwise from True South:

1.  $184^{\circ} 59'$ —8.50 feet along Grant 169 to William E. Gill to a "X" cut in rock set in concrete;

2.  $232^{\circ} 34' 30''$ —112.86 feet along Grant 169 to William E. Gill;
3. Thence along the South side of Kamehameha Highway, on a curve to the right with a radius of 3295.55 feet, the direct azimuth and distance being  $299^{\circ} 40' 45.5''$  368.52 feet;
4.  $32^{\circ} 53' 04''$ —5.00 feet along Kamehameha Highway;
5. Thence still along the South side of Kamehameha Highway, on a curve to the right with a radius of 3290.55 feet, the direct azimuth and distance being  $304^{\circ} 08' 25.5''$  144.25 feet;
6. Thence along the North side of Oahu Railway and Land Company's right-of-way, on a curve to the left with a radius of 1472.69 feet, the direct azimuth and distance being  $115^{\circ} 55' 31.5''$  305.77 feet;
7.  $19^{\circ} 58'$ —10.00 feet along Oahu Railway and Land Company's right-of-way;
8. Still along the North side of Oahu Railway and Land Company's right-of-way, on a curve to the left with a radius of 1462.69 feet, the direct azimuth and distance being  $104^{\circ} 55'$  257.50 feet to the point of beginning and containing an area of 22,897 square feet or 0.526 acre.

WRIGHT, HARVEY &  
WRIGHT,

By /s/ FRED E. HARVEY,  
Surveyor.

Honolulu, T. H., October 29, 1943. [52]

## Parcel 2-B

## Honolulu Plantation Company

Being R. P. 6428, L. C. Aw. 5669, Apana 2 to Kupaiea, situated about 750 feet in a Southerly direction from Oahu Railway and Land Company's right-of-way at Paaiau, Kalauao, Ewa, Oahu, T. H.

Beginning at the North corner of this piece of land, the true azimuth and distance to the end of Course 30 of Land Court Application 334 being  $231^{\circ} 40' 425.00$  feet to the above described initial point, and thence running by azimuths measured clockwise from True South:

1.  $328^{\circ} 00'$ —79.20 feet along Lot 1-B of Land Court Application 334;
2.  $60^{\circ} 00'$ —60.70 feet along Lot 1-B of Land Court Application 334;
3.  $148^{\circ} 28'$ —75.00 feet along Lot 1-B of Land Court Application 334;
4.  $236^{\circ} 00'$ —60.10 feet along Lot 1-B of Land Court Application 334 to the point of beginning and containing an area of 4,653 square feet or 0.107 acre.

WRIGHT, HARVEY &  
WRIGHT,

By /s/ FRED E. HARVEY,  
Surveyor.

Honolulu, T. H., October 29, 1943. [53]

## Parcel 3-B

## Aluli Estate

Being a portion of R. P. 114, L. C. Aw. 5878, Apana to Kukiiahu, situated on the South side of Oahu Railway and Land Company's right-of-way at Paaiau, Kalauao, Ewa, Oahu, T. H.

Beginning at a concrete monument at the North corner of this piece of land and on the south side of Oahu Railway and Land Company's right-of-way, said point of beginning being also the end of Course 29 of Land Court Application 334, and thence running by azimuths measured clockwise from True South:

1.  $324^{\circ} 40'$ —398.00 feet along portion of Grant 171 to Kuaana and R. P. 743, L. C. Aw. 7450-B to Kaiaka;
2.  $72^{\circ} 21'$ —97.00 feet along Lot 1-B of Land Court Application 334;
3.  $150^{\circ} 06'$ —419.50 feet along Lot 1-B of Land Court Application 334;
4.  $277^{\circ} 35'$ —72.00 feet along the South side of Oahu Railway and Land Company's right-of-way to the point of beginning and containing an area of 30,375 square feet or 0.697 acre.

WRIGHT, HARVEY &  
WRIGHT,

By /s/ FRED E. HARVEY,  
Surveyor.

Honolulu, T. H., October 29, 1943. [54]

Parcel 3-C

Aluli Estate

Being R. P. 114, L. C. Aw. 5878, Apana 2 to Kukiiahu, situated about 500 feet in a Southerly direction from Oahu Railway and Land Company's right-of-way at Paaiau, Kalauao, Ewa, Oahu, T. H.

Beginning at the North corner of this piece of land, being also the North corner of R. P. 114, L. C. Aw. 5878, Apana 2 to Kukiiahu, said North corner being also the end of Course 30 of Land Court Application 334, and thence running by azimuths measured clockwise from True South:

1.  $319^{\circ} 55'$ —170.00 feet along Lot 1-B of Land Court Application 334;
2.  $51^{\circ} 00'$ —121.50 feet along Lot 1-B of Land Court Application 334;
3.  $142^{\circ} 30'$ —157.70 feet along Lot 1-B of Land Court Application 334;
4.  $224^{\circ} 50'$ —114.80 feet along Lot 1-B of Land Court Application 334 to the point of beginning and containing an area of 19,297 square feet or 0.443 acre.

WRIGHT, HARVEY &  
WRIGHT,

By /s/ FRED E. HARVEY,  
Surveyor.

Honolulu, T. H., October 29, 1943. [55]

## Parcel 4

L. L. McCandless

Being portions of Grant 171 to Kuaana and Grant 169 to William E. Gill, situated at Paaiau, Kalauao, Ewa, Oahu, T. H.

Beginning at a concrete monument at the Northwest corner of this piece of land and on the South side of Oahu Railway and Land Company's right-of-way, said point of beginning being also the end of Course 29 of Land Court Application 334, and thence running by azimuths measured clockwise from True South:

1.  $277^{\circ} 35'$ —670.24 feet along the South side of Oahu Railway and Land Company's right-of-way;
2.  $7^{\circ} 35'$ —5.00 feet along the South side of Oahu Railway and Land Company's right-of-way;
3.  $45^{\circ} 28'$ —227.40 feet along Lot 1-B of Land Court Application 334;
4.  $41^{\circ} 30'$ —34.00 feet along Lot 1-B of Land Court Application 334;
5.  $124^{\circ} 46'$ —378.04 feet along R. P. 743, L. C. Aw. 7450-B to Kaiaka;
6.  $85^{\circ} 40'$ —118.00 feet along R. P. 743, L. C. Aw. 7450-B to Kaiaka;
7.  $144^{\circ} 40'$ —88.00 feet along R. P. 114, L. C. Aw.

5878, Apana 1 to Kukiiahu to the point of beginning and containing an area of 1.547 acres, more or less.

Compiled by:

WRIGHT, HARVEY &  
WRIGHT,

By /s/ FRED E. HARVEY,  
Surveyor.

Honolulu, T. H., November 3, 1943.

[Endorsed]: Filed July 17, 1944. [56]

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[Title of District Court and Cause No. 521.]

### DECLARATION OF TAKING

Whereas, pursuant to the authority of the Acts of Congress approved March 27, 1942 (Public Law 507, 77th Congress) and January 28, 1944 (Public Law 224, 78th Congress), the above-styled condemnation proceeding has been instituted.

Now, therefore, pursuant to the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), I, Secretary of the Navy, do hereby make and cause to be filed this declaration of taking, and by virtue of authority thereof do hereby state that the lands selected for acquisition aggregate 49.058 acres, more or less, on McGrew Point, Kalauao, Ewa, Oahu, Hawaii, more particularly described in Exhibit "A" attached hereto and made a part hereof and are delineated on a map entitled,

“Boundary Map of Base Hospital No. 8 on McGrew Point, Kalauao, Ewa, Oahu,” 14th N.D. Drawing No. OA-N1-785, approved December 2, 1943, revised February 17, 1944, attached hereto as Exhibit “B” and made a part hereof.

And I do declare said lands to be taken under authority of the aforesaid Acts of Congress; that the use to which said lands are to be put is the establishment of Base Hospital No. 8 for Mobile Hospital [58] Unit, as authorized by said Acts; and that the estate hereby taken in said lands for the public use aforesaid is a fee simple title, subject to public utility easements, pipe lines, and irrigation lines, if any.

And I do hereby state that the sum of money estimated by me to be just compensation for said lands, improvements thereon and appurtenances thereunto belonging, is fifty-five thousand, nine hundred and twenty-six dollars (\$55,926.00) which is hereby deposited into the registry of the court for the use and benefit of the persons entitled thereto, and that the amounts estimated to be just compensation for each ownership are shown on Schedule “A” attached hereto and made a part of this declaration of taking.

I am of the opinion that the ultimate award for the taking of said lands will be within the limits prescribed by Congress.

In Witness Whereof, the petitioner, by and through the Secretary of the Navy, has caused this declaration of taking to be signed and the seal of

the Department of the Navy to be affixed hereto on the 20th day of June, 1944, in the City of Washington, District of Columbia.

UNITED STATES OF  
AMERICA,

(Seal) By /s/ JAMES FORRESTAL. [59]

SCHEDULE "A"

The names and addresses of the persons having title to or other interest in the lands described in the within declaration of taking, and the amounts estimated to be just compensation for each respective ownership, including improvements thereon and appurtenances thereunto belonging, are as follows:

Parcel Number	Acres Area	Owner	Estimated Fair Compensation
1A	43.710	Katherine McGrew Cooper	\$ 55,000.00
1B-	.526		
2A	.470	Honolulu Plantation Company	25.00
2B	.107		
3A	1.558	Aluli Estate	350.00
3B	.697		
3C	.443		
4	1.547	L. L. McCandless Estate	551.00
<hr/> 49.058		Totals	<hr/> \$ 55,926.00

## EXHIBIT "A"

49.058 Acres more or less located at Kalauao, Ewa, Oahu, Territory of Hawaii.

Parcel No. 1 (Part "A") 43.710 Acres

Description of Lots 1-A, 1-B, 1-C and a portion of Lot 1-D of Land Court Application 334, situated along the south side of Oahu Railway and Land Company's right-of-way at Paaiau and Kupuai, Kalauao, Ewa, Oahu, T. H.

Beginning at a point at highwater mark, the co-ordinates of said point of beginning referred to a concrete monument being the initial point of Land Court Application 334 being 21.81 feet north and 292.49 feet west and the true azimuth and distance from said concrete monument to Government Survey Triangulation Station "Salt Lake" being  $297^{\circ} 59' 30''$ , 1008.67 feet, and thence running along the highwater mark by azimuths measured clockwise from true south, as follows:  $73^{\circ} 55'$ , 33.03 feet;  $52^{\circ} 00'$ , 164.8 feet;  $35^{\circ} 30'$ , 100.00 feet;  $58^{\circ} 00'$ , 200.00 feet;  $94^{\circ} 30'$ , 160.00 feet;  $90^{\circ} 00'$ , 100.00 feet;  $71^{\circ} 40'$ , 100.00 feet;  $53^{\circ} 10'$ , 300.00 feet;  $38^{\circ} 39'$ , 100.00 feet;  $18^{\circ} 40'$ , 150.00 feet;  $32^{\circ} 50'$ , 198.00 feet;  $131^{\circ} 10'$ , 260.00 feet;  $118^{\circ} 30'$ , 403.00 feet;  $132^{\circ} 20'$ , 170.00 feet;  $158^{\circ} 30'$ , 100.00 feet;  $186^{\circ} 50'$ , 280.00 feet;  $203^{\circ} 20'$ , 100.00 feet;  $214^{\circ} 50'$ , 130.00 feet;  $189^{\circ} 20'$ , 100.00 feet;  $161^{\circ} 50'$ , 200.00 feet;  $146^{\circ} 00'$ , 150.00 feet; thence along Grant 171 to Kuaana as follows:  $220^{\circ} 00'$ , 221.70 feet passing over a concrete monument at 17.60 feet, and passing over another concrete monument at 195.30 feet;  $296^{\circ} 00'$ , 65.30 feet;

284° 00', 140.60 feet; 225° 30', 99.00 feet; 183° 10', 31.70 feet; 248° 20', 58.20 feet to a concrete monument on the south side of Oahu Railway and Land Company right-of-way; 277° 35', 198.50 feet along the south side of Oahu Railway and Land Company's right-of-way; 324° 40', 558.00 feet along Grant 171 to Kuaana and R. P. 743, L. C. Aw. 7450-B to Kaiaka; 221° 30', 270.00 feet along R. P. 743, L. C. Aw. 7450-B to Kaiaka and Grant 169 to William E. Gill; 225° 28', 227.40 feet along Grant 169 to William E. Gill and Grant 171 to Kuaana, to the south side of Oahu Railway and Land Company's right-of-way; thence along the south side of Oahu Railway and Land Company's right-of-way, on a curve to the right with a radius of 1402.69 feet, the direct azimuth and distance of the chord being 283° 39' 30", 307.20 feet; 19° 57', 10.00 feet along Oahu Railway and Land Company's right-of-way; thence along the south side of Oahu Railway and Land Company's right-of-way, on a curve to the right with a radius of 1392.69 feet, the direct azimuth and distance of the chord being 293° 50' 30", 189.04 feet; thence along the remainder of Lot 1-D of Land Court Application 334, as follows: 48° 00', 32.03 feet; 300° 48', 167.96 feet; 312° 16' 30", 101.13 feet; thence on a curve to the right with a radius of 136.08 feet, the direct azimuth and distance of the chord being 19° 20', 126.09 feet; [61] 46° 56', 132.00 feet; 342° 00', 151.60 feet to the point of beginning.

Containing within the above described perimeter, a gross area of 45.427 acres, before deducting the following exceptions:

Parcel No. 2 (Part A) 0.470 Acre

Parcel No. 2 (Part B) 0.107 Acre

Parcel No. 3 (Part B) 0.697 Acre

Parcel No. 3 (Part C) 0.443 Acre

Containing after said exceptions, 43.710 acres.

Parcel No. 1 (Part "B") 0.526 Acre

Being Lot 3-A of Land Court Application 334, situated between the southwest side of Kamahameha Highway and the northeast side of Oahu Railway and Land Company's right-of-way, at Paaiau, Kalauao, Ewa, Oahu, T. H.

Beginning at the southwest corner of this piece of land and on the northeast side of Oahu Railway and Land Company's right-of-way, and thence running by azimuths measured clockwise from true south; 184° 59', 8.50 feet along Grant 169 to William E. Gill to a "†" cut in rock set in concrete; 232° 34' 30", 112.86 feet along Grant 169 to William E. Gill: thence along the south side of Kamahameha Highway, on a curve to the right with a radius of 3295.55 feet, the direct azimuth and distance of the chord being 299° 40' 45.5", 368.52 feet; 32° 53' 04", 5.00 feet along Kamehameha Highway; thence still along the south side of Kamahameha Highway, on a curve to the right with a radius of 3290.55 feet, the direct azimuth and distance of the chord, being 304° 08' 25.5", 144.25 feet; thence along the north side of Oahu Railway and Land Company's right-of-way, on a curve to the left with

a radius of 1472.69 feet, the direct azimuth and distance of the chord being  $115^{\circ} 55'$ , 31.5", 305.77 feet;  $19^{\circ} 58'$ , 10.00 feet along Oahu Railway and Land Company's right-of-way; still along the north side of Oahu Railway and Land Company's right-of-way, on a curve to the left with a radius of 1462.69 feet, the direct azimuth and distance of the chord being  $104^{\circ} 55'$ , 257.50 feet to the point of beginning and containing an area of 22,897 square feet or 0.526 acre.

Parcel No. 2 (Part "A") 0.470 Acre

Being R.P. 6428, L. C. Aw. 5669, Apana 1 to Kupihea, situated near the south side of Oahu Railway and Land Company's right-of-way at Paaiau, Kalanua, Ewa, T. H.

Beginning at a concrete monument at the north corner of this piece of land, said point of beginning being also the end of course 26 of Land Court Application 334, and thence running by [62] azimuths measured clockwise from true south along Lot 1-B of Land Court Application 334 as follows:  $324^{\circ} 30'$  594.00 feet;  $68^{\circ} 42'$  38.50 feet;  $147^{\circ} 00'$  143.90 feet;  $142^{\circ} 00'$  138.60 feet;  $195^{\circ} 00'$  17.80 feet;  $129^{\circ} 00'$  66.00 feet;  $146^{\circ} 40'$ , 222.40 feet;  $225^{\circ} 30'$ , 33.00 feet along Grant 171 to Kuaana to the point of beginning and containing an area of 20,465 square feet or 0.47 acre.

Parcel No. 2 (Part "B") 0.107 Acre

Being R. P. 6428, L. C. Aw. 5669, Apana 2 to Kupiahea, situated about 750 feet in a southerly

direction from Oahu Railway and Land Company's right-of-way at Paaiau, Kalauao, Ewa, Oahu, T.H.

Beginning at the north corner of this piece of land, the true azimuth and distance from the end of Course 30 of Land Court Application 334 being  $231^{\circ} 40'$ , 425.00 feet to the above described initial point, and thence running by azimuths measured clockwise from true south along Lot 1-B of Land Court Application 334, as follows:  $328^{\circ} 00'$ , 79.20 feet;  $60^{\circ} 00'$ , 60.70 feet;  $148^{\circ} 28' 75.00$  feet;  $236^{\circ} 00'$ , 60.10 feet to the point of beginning and containing an area of 4,653 square feet or 0.107 acre.

Parcel No. 3 (Part "A") 1.558 Acres

Being R. P. 743, L.C.Aw. 7450-B to Kaiaka, situated near the south side of Oahu Railway and Land Company's right-of-way at Paaiau, Kalauao, Ewa, Oahu, T. H.

Beginning at the south corner of this piece of land, being also the south corner of R.P. 743, L. C. Aw. 7450-B to Kaiaka and the north corner of R.P. 114, L. C. Aw. 5878, Apana 2 to Kukiiahu, said point of beginning being also the end of Course 30 of Land Court Application 334, and thence running by azimuths measured clockwise from true south;  $144^{\circ} 40'$ , 470.00 feet along Lot 1-B of Land Court Application 334 and R. P. 114, L. C. Aw. 5878, Apana 1 to Kukiiahu;  $265^{\circ} 40'$ , 118.00 feet along Grant 171 to Kuaana;  $334^{\circ} 46'$ , 378.04 feet along Grant 169 to William E. Gill;  $41^{\circ} 30'$ , 236.00 feet along Lot 1-B of Land Court Application 334 to the point of beginning and containing an area of 1.558 acres, more or less.

## Parcel No. 3 (Part "B") 0.697 Acre

Being a portion of R. P. 114, L.C.Aw. 5878, Apana 1 to Kukiiahu, situated on the south side of Oahu Railway and Land Company's right-of-way at Paaiau, Kalauao, Ewa, Oahu, T. H.

Beginning at a concrete monument at the north corner of this piece of land and on the south side of Oahu Railway and Land Company's [63] right-of-way, said point of beginning being also the end of Course 29 of Land Court Application 334, and thence running by azimuths measured clockwise from true south:  $324^{\circ} 40'$ , 398.00 feet along portion of Grant 171 to Kuaana and R. P. 743, L. C. Aw. 7450-B to Kaiaka;  $72^{\circ} 20'$ , 97.00 feet along Lot 1-B of Land Court Application 334;  $150^{\circ} 06'$ , 419.50 feet along Lot 1-B of Land Court Application 334;  $277^{\circ} 35'$ , 72.00 feet along the south side of Oahu Railway and Land Company's right-of-way to the point of beginning and containing an area of 30,375 square feet or 0.697 acre.

## Parcel No. 3 (Part "C") 0.443 Acre

Being R. P. 114, L.C. Aw. 5878, Apana 2 to Kukiiahu, situated about 500 feet in a southerly direction from Oahu Railway and Land Company's right-of-way at Paaiau, Kalauao, Ewa, Oahu, T. H.

Beginning at the north corner of this piece of land, being also the north corner of R.P. 114, L.C. Aw. 5878, Apana 2 to Kukiiahu, said north corner being also the end of Course 30 of Land Court Application 334, and thence running by azimuths and measured clockwise from true south, along

Lot 1-B of Land Court Application 334, as follows: 319° 55', 170.00 feet; 51° 00', 121.50 feet; 142° 30', 157.70 feet; 224° 50', 114.80 feet to the point of beginning and containing an area of 19,297 square feet or 0.443 acre.

Parcel No. 4, 1.547 Acres

Being portions of Grant 171 to Kuaana and Grant 169 to William E. Gill, situated at Paaiau, Kalauao, Ewa, Oahu, T. H.

Beginning at a concrete monument at the north-west corner of this piece of land and on the south side of Oahu Railway and Land Company's right-of-way, said point of beginning being also the end of Course 29 of Land Court Application 334, and thence running by azimuths measured clockwise from true south: 227° 35', 670.24 feet along the south side of Oahu Railway and Land Company's right-of-way: 7° 35', 5.00 feet along the south side of Oahu Railway and Land Company's right-of-way: 45° 28', 227.40 feet along Lot 1-B of Land Court Application 334; 41° 30', 34.00 feet along Lot 1-B of Land Court Application 334; 124° 46', 378.04 feet along R.P. 743, L.C.Aw. 7450-B to Kaiaka; 85° 40', 118.00 feet along R.P. 743, L.C.Aw. 7450-B to Kaiaka; 114° 40' 88.00 feet along R.P. 114, L.C. Aw. 5878, Apana 1 to Kukiiahu to the point of beginning and containing an area of 1.547 acres, more or less.

Containing in all the above described parcels, 49.058 acres, more or less, as delineated on that certain plat entitled "Base Hospital No. 8, on McGrew

Point, Kalauao, Ewa, Oahu"—Drawing No. OA-N1-785—approved December 2, 1943,—altered February 17, 1944.

[Endorsed]: Filed July 17, 1944. [64]

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In the District Court of the United States  
for the District of Hawaii

April Term 1944

Civil No. 521

UNITED STATES OF AMERICA,

Petitioner,

vs.

49.058 ACRES OF LAND, more or less, McGrew  
Point, Kalauao, Ewa, Oahu, Hawaii, and Kath-  
arine McGrew Cooper, et al.,

Defendants.

ORDER AND JUDGMENT ON DECLARATION  
OF TAKING

It appearing to the Court that on the 17th day of July, 1944, the United States of America filed herein a Petition for Condemnation of certain land described in Exhibit "A" hereto annexed and made a part hereof as though set forth at length:

That contemporaneously therewith there was filed a Declaration of Taking signed by James Forrestal, Secretary of Navy of the United States, under and pursuant to the provisions of the Act of Congress approved February 26, 1931 (46 Stat., 1421), and acts supplementary thereto and amendatory thereof, and under the further authority of

the Act of Congress approved March 27, 1942 (Public Law 507—77th Congress), and the Act of Congress approved January 28, 1944 (Public Law 224—78th Congress), for the taking of the fee simple title in and to the lands described in said Exhibit “A”, subject to existing public utility easements; and that the uses of said land being acquired are described in said Acts of authority and in said Declaration of Taking and in the verified Petition of the United States of America filed herein, and that said Declaration of Taking further sets forth the estimate of just compensation, made pursuant to law; and that contemporaneously therewith there was deposited in the registry of this court for the use of the persons entitled thereto, the sum of Fifty-five thousand, nine hundred and [67] twenty-six dollars (\$55,926.00); and for good cause shown and the Court being fully advised in the premises,

It is ordered, adjudged and decreed that by virtue of the filing of the said Declaration of Taking as aforesaid, and upon the premises aforesaid, that title of the land described in said Exhibit “A”, be and it is hereby indefeasibly vested in the United States of America in fee simple, subject to existing public utility easements; and

It is further ordered and adjudged that the owners, claimants and occupants of said land on every part and parcel thereof, forthwith deliver to the Petitioner herein and to its duly authorized agents the immediate and exclusive possession of said lands; and it appearing that the petitioner has been in the exclusive and continuous possession of said lands from and since the dates set forth

in the petition herein to the present time, such possession of the United States of America is hereby confirmed as of the following dates:

Parcel Number—Date of Possession

1A—September 1, 1943

1B—December 1, 1943

2A and 2B—September 28, 1943

3A, 3B, 3C and 4—October 1, 1943;

and

It is further ordered that a certified copy of this Order with the Certificate of the Clerk of this Court showing the payment into the Registry of this Court of the sum hereinabove set forth, be promptly served by the United States Marshal, upon each of defendants named and upon each and every person, company or corporation in possession of said premises, and the Marshal is ordered to post a certified copy hereof at a conspicuous place on the premises and to forthwith make due return of his said service to this Court.

Dated: Honolulu, T.H., this 17th day of July, 1944.

/s/ J. FRANK McLAUGHLIN,

Judge of the District Court of the United States  
for the District of Hawaii.

[Printer's Note: Exhibit "A" (description of land) attached to Order and Judgment on Declaration of Taking is similar to Exhibit "A" attached to the Petition for Condemnation and set out at pages 40-51 of this printed Record.]

[Endorsed]: Filed July 17, 1944. [68]

[Title of District Court and Cause No. 521.]

## ANSWER OF HONOLULU PLANTATION COMPANY

Comes now Honolulu Plantation Company, one of the defendants named in the above entitled matter, and for answer to the petition for condemnation filed herein admits, denies and alleges as follows:

### I.

That with respect to the allegations contained in paragraphs I, II, III, IV, V, VI, VII and VIII of said petition, except as hereinafter alleged, this defendant has insufficient information to either admit or deny the same and leaves the petitioner to its proof thereof.

### II.

That with respect to the allegations contained in paragraph VIII of said petition this defendant admits that it is the owner in fee simple of Parcels 2-A and 2-B described in said petition and is lessee of the Noa W. Aluli Estate of Parcels 3-A, 3-B and 3-C under unrecorded Lease dated May 28, 1935, as extended by Extension of Lease dated August 25, 1939 and May 8, 1942 for a term to expire five (5) years from January 1, 1944.

### III.

That by way of further answer to the allegations contained in paragraphs VI and VIII, this defendant alleges that it has been served with a copy of the Declaration of Taking therein mentioned, attached to which as [80] Schedule "A" is a state-

ment of the petitioner's estimated fair compensation for the taking of the property of this defendant; that said Schedule "A" does not show the just compensation for the taking of the property of this defendant; that the value of said property and the interests of this defendant therein and the just compensation for the taking thereof is greatly in excess of the amounts stated in said Schedule, and this defendant denies that the amounts set forth therein are just compensation for said property and the interests therein of this defendant as owner and as lessee as aforesaid.

Wherefore this defendant prays that the Court determine the estate and interest of this defendant in and to the parcels of land hereinabove mentioned, described or referred to and the compensation and damages to be awarded to this defendant for the taking of its property and leaseholds and in the improvements thereon; and that this defendant be allowed its costs herein and such other and further relief as the Court may deem meet and just in the premises.

Dated: Honolulu, T. H., August 5th, 1944.

HONOLULU PLANTATION  
COMPANY,

By /s/ P. E. SPALDING,  
Its Attorney-in-fact.

(Duly Verified.)

[Endorsed]: Filed Aug. 7, 1944. [81]

[Title of District Court and Cause No. 521.]

### AMENDED DECLARATION OF TAKING

Whereas, pursuant to the authority of the Acts of Congress approved March 27, 1942 (Public Law 507, 77th Congress) and January 28, 1944 (Public Law 224, 78th Congress), the above-styled condemnation proceeding has been instituted.

Now, therefore, pursuant to the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), I, Secretary of the Navy, do hereby make and cause to be filed this amended declaration of taking, and by virtue of authority thereof do hereby state that the lands selected for acquisition aggregate 49.058 acres, more or less, on McGrew Point, Kalauao, Ewa, Oahu, Hawaii, more particularly described in Exhibit "A" attached hereto and made a part hereof, and are relineated on a map entitled, "Boundary Map of Base Hospital No. 8 on McGrew Point, Kalauao, Ewa, Oahu," 14th N.D. Drawing No. OA-N1-785, approved December 2, 1943, revised February 17, 1944, attached hereto as Exhibit "B" and made a part hereof.

And I do declare said lands to be taken under authority of the aforesaid Acts of Congress; that the use to which said lands are to be put is the establishment of Base Hospital No. 8 for Mobile Hospital Unit, [82] as authorized by said Acts; and that the estate hereby taken in said lands for the public use aforesaid is a fee simple title, subject to existing public utility easements.

And I do hereby state that the sum of money estimated by me to be just compensation for said lands, improvements thereon and appurtenances thereunto belonging, is Ninety-seven thousand, five hundred dollars (\$97,500.00), which is hereby deposited into the registry of the court for the use and benefit of the persons entitled thereto, and that the amounts estimated to be just compensation for each ownership are shown on Schedule "A" attached hereto and made a part of this amended declaration of taking.

I am of the opinion that the ultimate award for the taking of said lands will be within the limits prescribed by Congress.

In Witness Whereof, the petitioner, by and through the Secretary of the Navy, has caused this amended declaration of taking to be signed on the twenty-seventh day of August, 1945, in the City of Washington, District of Columbia.

UNITED STATES OF  
AMERICA,

By /s/ JAMES FORRESTAL. [83]

SCHEDULE "A"

The names and addresses of the persons having title to or other interest in the lands described in the within declaration of taking, and the amounts estimated to be just compensation for each respective ownership, including improvements thereon and appurtenances thereunto belonging, are as follows:

Parcel Number	Acres Area	Owner	Estimated Fair Compensation
1A	43.710	Katharine McGrew Cooper	\$ 95,513.00
1B	.526		
2A	.470	Honolulu Plantation Company	155.00
2B	.107		
3A	1.558	Aima N. Aluli	922.00
3B	.697	Auwae L. Aluli	
3C	.443	Noa T. Aluli	
		Trustees under the Will and of the Estate of Noa W. Aluli	
4	1.547	A. Lester Marks	910.00
		Elizabeth Loy Marks	
		Elizabeth Janet Cartwright McCandless	
		Trustees under the Will and of the Estate of Lincoln Loy Mc- Candless, deceased	
<hr/>			<hr/>
	49.058	Totals	\$ 97,500.00

[Printer's Note: Exhibit "A" (description of land) attached to Amended Declaration of Taking is similar to Exhibit "A" attached to Petition for Condemnation and set out at pages 40-51 of this printed Record.]

[Endorsed]: Filed Oct. 30, 1945.

[84]

[Title of District Court and Cause No. 521.]

## ORDER AND JUDGMENT ON AMENDED DECLARATION OF TAKING

It appearing to the Court that on the 17th day of July, 1944, the United States of America filed a Petition for Condemnation of certain land described in said Petition and the Exhibits attached thereto and that there was filed in the above cause a Declaration of Taking signed by James Forrestal, Secretary of the Navy of the United States, and it further appearing that on the 30th day of October, 1945, there was filed an Amended Declaration of Taking in the above cause, signed by James

Forrestal, Secretary of the Navy of the United States, and that said amended Declaration of Taking sets forth a new estimate of just compensation made pursuant to law, and that contemporaneously with the filing of said amended Declaration of Taking there was deposited in the registry of this Court for the use of the persons entitled thereto the sum of Forty-One Thousand, Five Hundred Seventy-four Dollars (\$41,574.00) as an additional amount for the use of the persons entitled thereto and good cause shown and the Court being fully advised in the premises, [96]

It Is Ordered, Adjudged and Decreed that by virtue of the filing of said amended Declaration of Taking as aforesaid, that title of the land described in Exhibit "A" and delineated on the map attached thereto as Exhibit "B" has been and is hereby indefeasibly vested in the United States of America in fee simple, subject to existing public utility easements; and

It Is Further Ordered that a copy of this Order be promptly served by the United States Marshal upon each of the defendants in this cause. The Marshal is further ordered to post a copy hereof in a conspicuous place on the premises and to forthwith make due return of his said service to this Court.

Dated Honolulu, T. H., this 30th day of October, 1945.

/s/ D. E. METZGER.

Judge of the United States District Court for the District of Hawaii.

[Endorsed]: Filed Oct. 30, 1945.

[97]

In the District Court of the United States  
For the District of Hawaii

April Term 1944

Civil No. 525

UNITED STATES OF AMERICA,

Petitioner,

vs.

216.124 ACRES OF LAND, more or less, in Moanalua, Honolulu, Oahu, Territory of Hawaii, John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, et al.,

Defendants.

### PETITION FOR CONDEMNATION

To the Honorable, the Presiding Judges of the  
United States District Court for the District of  
Hawaii:

Now comes the United States of America, by Charles F. Rathbun and Robert S. Tarnay, Special Assistants to the Attorney General, acting under the instructions of the Attorney General of the United States and at the request of the Secretary of Navy of the United States, and respectfully represents to the Court:

#### I.

That this proceeding is instituted under the authority of divers and sundry Acts of Congress, among them the following:

The Act of Congress approved March 27, 1942 (Public Law 507—77th Congress)

The Act of Congress approved January 28, 1944 (Public Law 224—78th Congress)

and that the Secretary of Navy, acting under authority vested in him by law and pursuant to law, has determined that it is necessary to acquire for the United States of America by condemnation, under judicial process, certain land more particularly described in Exhibits "A" and "B", hereto annexed and made a part hereof as though set forth at length. [99]

## II.

That the land sought to be condemned is located in Moanalua, Honolulu, Oahu, Territory of Hawaii, and lies wholly within the jurisdiction of the United States District Court for the Territory of Hawaii, together with all improvements thereon and appurtenances thereunto belonging, as described in said Exhibits "A" and "B".

## III.

That attached hereto and made a part hereof is a map or plat marked Exhibit "B", delineating said property.

## IV.

That the interest sought to be condemned is the full fee simple title to said land and all improvements thereon and appurtenances thereunto belonging, subject to existing public utility, pipe line, and irrigation and drainage easements.

## V.

That the said land and improvements thereon and appurtenances thereunto belonging are to be acquired under the authority of and for the purposes set forth in the various Acts of Congress hereinabove mentioned, and particularly for use in connection with storage facilities and as a site for Camp Catlin.

## VI.

That John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased; Samuel Renny Damon; Honolulu Plantation Company; City and County of Honolulu and Territory of Hawaii are the owners of or claim to have some interest in said land, and that other persons interested therein are to the petitioner unknown, and any and all persons, companies or corporations owning, having or claiming any right, title, estate, interest, lien, encumbrance, claim or charge in, to or upon the land are described as "Unknown Owners" and are designated [100] as John Does One to Fifty and Mary Roes One to Fifty, and are named as defendants in this proceeding.

## VII.

That the Secretary of Navy of the United States has determined that the utmost haste in expediting this project is vital to the War purposes of the United States and he has therefore determined that immediate possession of said land and all im-

provements thereon and appurtenances thereunto belonging, to the extent of the interest to be acquired therein, is necessary by the United States and that certain and adequate provisions have been made for the payment of just compensation which may be adjudged due for the condemnation of the land described in said Exhibits "A" and "B"; and that the petitioner has been in actual possession of Parcel D-4, described and shown in said Exhibits "A" and "B", from and since July 7, 1942 under a right of entry granted by John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, and consented to by the Honolulu Plantation Company; and has likewise been in possession of Parcel D-6, described and shown in said Exhibits "A" and "B", under a lease executed between the petitioner and John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, dated June 12, 1942 demising a term beginning July 21, 1941, which lease as extended expired June 30, 1944, and that petitioner has remained in possession from the date of expiration of said lease extended until the present time. That by said right of entry, it was provided that in case the Government should undertake to acquire any interest in the premises or any part thereof by condemnation proceedings, that the said John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and

John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, would claim no damages or any interest in any improvements made to the premises by the [101] petitioner, and further providing that the condition of the said premises as of the date of the right of entry should be taken for valuation purposes as the condition of the premises on the date of taking in said proceedings; that it was stipulated and agreed in said lease, that on July 21, 1941 the property, described herein, was unimproved, uncleared and unleveled, and that no claim would be made by the lessor for any damages or interest in any improvements placed upon the land by the Government or for any clearing, leveling, utility installations or roads placed thereon by the United States.

Wherefore, your petitioner prays this Honorable Court to take jurisdiction of this cause and to make and enter all orders, judgments and decrees necessary to determine title of said real estate condemned, or any part thereof; and to fix and determine the just compensation due for the condemnation of the aforesaid lands; that the Court adjudge and determine that the immediate possession of said lands be taken to the extent of the interest being acquired herein for the War and Naval purposes of the United States; that upon payment into the registry of this court for the United States for use of the persons entitled thereto of the sum adjudged to be full compensation for the said condemnation of said land, that title

of said land be vested in the United States of America in fee simple absolute, subject to the exceptions set forth in paragraph IV; and that the court make distribution of the final awards among the persons entitled thereto as expeditiously as may be and for such other and further relief as to the Court may seem just and proper in the premises.

UNITED STATES  
OF AMERICA,

By /s/ CHARLES F. RATHBUN,  
Special Asst. to Atty. General.

By /s/ ROBERT S. TARNEY,  
Special Asst. to Atty. General.

(Duly Verified.)

[102]

EXHIBIT "A"

PARCEL D-4

Being portions of Lots G and H of Land Court  
Application 1074 Situated at Moanalua, Honolulu, Oahu, T. H.

Beginning at the South corner of this parcel of land, at the intersection of the new mauka line of Kamehameha Highway, said line established by Territory of Hawaii Condemnation Law No. 17049, and the Ewa boundary of Puuloa Road (Exclusion 14 of Land Court Application 1074), the true azimuth and distance from a City and County Survey Street Monument being  $244^{\circ} 09' 190.74$  feet and the co-ordinates of said City and County Survey Street Monument referred to Government Survey Triangulation Station No. 1074.

gulation Station "Salt Lake" being 10085.47 feet South and 1487.34 feet East, and thence running by azimuths measured clockwise from True South from the above described initial point:

1.  $99^{\circ} 04'$ —1635.89 feet along the new mauka line of Kamehameha Highway, said line established by Territory of Hawaii Condemnation Law No. 17049;
2.  $99^{\circ} 03' 20''$ —1812.37 feet along the new mauka line of Kamehameha Highway, said line established by Territory of Hawaii Condemnation Law No. 17049;
3. Thence on a curve to the left with a radius of 50.00 feet along the remainder of Lot G of Land Court Application 1074, the direct azimuth and distance being  $235^{\circ} 46' 10''$  68.56 feet;
4.  $192^{\circ} 29'$ —288.52 feet along the remainder of Lot G of Land Court Application 1074; [104]
5.  $189^{\circ} 04'$ —802.03 feet along the remainders of Lots G and H of Land Court Application 1074;
6.  $276^{\circ} 20' 40''$ —2882.96 feet along the remainder of Lot H of Land Court Application 1074, along Parcel D-6;
7.  $9^{\circ} 04'$ —484.09 feet along the remainder of Lot H of Land Court Application 1074;
8.  $348^{\circ} 26'$ —337.76 feet along Lot H of Land Court Application 1074;
9.  $273^{\circ} 14'$ —74.80 feet along Lot H of Land Court Application 1074;
10.  $251^{\circ} 39'$ —171.50 feet along Lot H of Land Court Application 1074;

11. 275° 28'—97.96 feet along Lot H of Land Court Application 1074;
12. 327° 00'—485.39 feet along Lot H of Land Court Application 1074;
13. Thence on a curve to the right with a radius of 885.36 feet along the Ewa boundary of Puuloa Road (Exclusion 14 of Land Court Application 1074), the direct azimuth and distance being 61° 24' 01" 336.82 feet to the point of beginning and containing an area of 87.724 acres.

WRIGHT, HARVEY &  
WRIGHT,

By /s/ FRED E. HARVEY,  
Surveyor.

[105]

Honolulu, T. H. June 28, 1944.

### PARCEL D-6

Being portions of Lots H and J of Land Court Application 1074 Situated at Moanalua, Honolulu, Oahu, T. H.

Beginning at the most Westerly corner of this parcel of land, the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 8298.51 feet South and 1945.23 feet West, and thence running by azimuths measured clockwise from true South:

1. 211° 59' 30"—190.64 feet along the remainder of Lot H and along Lot J of Land Court Application 1074;

2.  $221^{\circ} 03'$ —321.00 feet along Lot J of Land Court Application 1074;
3.  $222^{\circ} 51'$ —283.80 feet along Lot J of Land Court Application 1074;
4.  $201^{\circ} 10'$ —473.50 feet along Lot J of Land Court Application 1074;
5.  $207^{\circ} 05'$ —82.51 feet along Lot J of Land Court Application 1074 to a pipe;
6.  $263^{\circ} 08' 30''$ —185.88 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
7.  $234^{\circ} 54'$ —81.89 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
8.  $284^{\circ} 11'$ —264.11 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
9.  $273^{\circ} 42' 30''$ —228.00 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
10.  $253^{\circ} 53' 30''$ —353.58 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
11.  $250^{\circ} 29'$ —379.28 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
12.  $233^{\circ} 54'$ —232.37 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
13.  $313^{\circ} 05'$ —52.75 feet along the remainder of Lot J of Land Court Application 1074 to a pipe;
14.  $310^{\circ} 07' 30''$ —311.80 feet along the remainder

of Lots J and H of Land Court Application 1074 to a pipe; [106]

15.  $287^{\circ} 04'$ —111.76 feet along the remainders of Lots H and J of Land Court Application 1074 to a pipe;
16.  $261^{\circ} 29' 30''$ —212.56 feet along the remainder of Lot J of Land Court Application 1074 to a pipe;
17.  $269^{\circ} 46' 30''$ —532.18 feet along the remainder of Lot J of Land Court Application 1074 to a pipe;
18.  $249^{\circ} 15'$ —184.30 feet along the remainder of Lot J of Land Court Application 1074 to a pipe;
19.  $261^{\circ} 24'$ —293.95 feet along the remainder of Lot J of Land Court Application 1074 to a pipe;
20.  $225^{\circ} 11'$ —365.11 feet along the remainder of Lot J of Land Court Application 1074 to a pipe;
21.  $300^{\circ} 44'$ —28.55 feet along the remainder of Lot J of Land Court Application 1074 to a nail driven in rock;
22.  $353^{\circ} 50'$ —135.00 feet along the remainder of Lot J of Land Court Application 1074 to a nail driven in rock;
23.  $333^{\circ} 34'$ —223.39 feet along the remainder of Lot J of Land Court Application 1074 to a pipe;
24.  $295^{\circ} 25'$ —238.48 feet along the remainder of Lot J of Land Court Application 1074 to a pipe;
25.  $46^{\circ} 04' 30''$ —153.24 feet along the remainder of

- Lot J of Land Court Application 1074 to a pipe;
26.  $36^{\circ} 56'$ —142.30 feet along the remainder of Lot J of Land Court Application 1074 to a pipe;
  27.  $10^{\circ} 49'$ —257.90 feet along the remainder of Lot J of Land Court Application 1074 to a pipe;
  28.  $102^{\circ} 20'$ —67.80 feet along the remainder of Lot J of Land Court Application 1074 to a pipe;
  29.  $75^{\circ} 08' 30''$ —57.98 feet along the remainder of Lot J of Land Court Application 1074 to a pipe;
  30.  $15^{\circ} 31' 30''$ —55.92 feet along the remainder of Lot J of Land Court Application 1074 to a pipe;
  31.  $344^{\circ} 17'$ —97.50 feet along the remainder of Lot J of Land Court Application 1074 to a pipe;
  32.  $18^{\circ} 46'$ —290.80 feet along the remainders of Lots J and H of Land Court Application 1074 to a pipe;
  33.  $133^{\circ} 40' 30''$ —222.30 feet along the remainder of Lot H of Land Court Application 1074 to a pipe; [107]
  34.  $66^{\circ} 25' 30''$ —209.34 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
  35.  $337^{\circ} 22'$ —230.59 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
  36.  $21^{\circ} 06'$ —163.70 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;

37.  $326^{\circ} 04'$ —69.39 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
38.  $307^{\circ} 00' 30''$ —123.55 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
39.  $253^{\circ} 02' 30''$ —117.89 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
40.  $271^{\circ} 06'$ —87.69 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
41.  $353^{\circ} 16' 30''$ —8508 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
42.  $348^{\circ} 28'$ —213.58 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
43.  $345^{\circ} 06' 30''$ —137.92 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
44.  $357^{\circ} 25'$ —231.17 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
45.  $71^{\circ} 43' 30''$ —180.37 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
46.  $99^{\circ} 25' 30''$ —149.31 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
47.  $190^{\circ} 28'$ —340.98 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;

48.  $210^{\circ} 40' 30''$ —87.71 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
49.  $135^{\circ} 48' 30''$ —216.24 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
50.  $82^{\circ} 01'$ —110.23 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
51.  $177^{\circ} 13'$ —92.00 feet along the remainder of Lot H of Land Court Application 1074 to a pipe;
52.  $145^{\circ} 24' 30''$ —125.58 feet along the remainder of Lot H of Land Court Application 1074 to a pipe; [108]
53.  $116^{\circ} 48'$ —136.72 feet along the remainder of Lot H of Land Court Application 1074 to a spike;
54.  $20^{\circ} 38' 30''$ —385.00 feet along the remainder of Lot H of Land Court Application 1074;
55.  $96^{\circ} 20' 40''$ —3415.67 feet along the remainder of Lot H of Land Court Application 1074, along Parcel D-4 to the point of beginning and containing an area of 128.40 acres.

Honolulu, T. H. June 28, 1944.

WRIGHT, HARVEY &  
WRIGHT,

By /s/ FRED E. HARVEY,  
Surveyor.

[Title of District Court and Cause No. 525.]

## ANSWER OF HONOLULU PLANTATION CO.

Comes now Honolulu Plantation Company, one of the defendants named in the above entitled matter, and for answer to the petition for condemnation filed herein admits, denies and alleges as follows:

### I.

That with respect to the allegations contained in paragraphs I, II, III, IV, V. VI, and VII, except as hereinafter alleged, this defendant has insufficient information to either admit or deny the same and leaves the petitioner to its proof thereof.

### II.

That with respect to the allegations contained in paragraph VII of said petition this defendant alleges that it holds a leasehold interest in certain of the properties described in the exhibits attached to said petition.

Wherefore this defendant prays that the court determine [112] the interest and estate of this defendant in and to the parcels of land sought to be condemned by the petitioner in these proceedings, and that the court determine the compensation and damages to be awarded to this defendant for the taking of its property, and that this defendant be allowed its costs herein and such other and fur-

ther relief as the court may deem meet and just in the premises.

Dated Honolulu, T. H., October 24, 1944.

HONOLULU PLANTATION  
COMPANY,

(Seal) By /s/ P. E. SPALDING,  
Attorney-in-Fact.

(Duly Verified.)

[Endorsed]: Filed Nov. 2, 1944.

[113]

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[Title of District Court and Cause No. 525.]

DECLARATION OF TAKING

Whereas, pursuant to the Acts of Congress approved March 27, 1942 (Public Law 507, 77th Congress), and January 28, 1944 (Public Law 224, 78th Congress), the above-styled condemnation proceeding has been instituted.

Now, Therefore, pursuant to the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), I, Secretary of the Navy, do hereby make and cause to be filed this declaration of taking, and by virtue of authority thereof do hereby state that the lands selected for acquisition aggregate 216.124 acres, more or less, at Moanalua, Honolulu, Oahu, Territory of Hawaii, more particularly described in Exhibit "A" attached hereto and made a part hereof. The lands are delineated on a map entitled, "Composite Boundary Map,

Portions of the Lands of the Estate of Emma Kaleleonalani, Deceased, at Halawa, Ewa, Oahu, T. H., and the Estate of S. M. Damon, deceased, at Moanalua, Honolulu, Oahu, T. H., "designated as 14th N. D. Dwg. No. OA-N1-942, attached hereto as Exhibit "B" and made a part hereof. [114]

And I do declare said lands to be taken under the authority of the aforesaid Acts of Congress; that the uses to which said lands are to be put are a storage area and a site for Camp Catlin and Fleet School, as authorized by said Acts; and that the estate hereby taken in said lands is a fee simple title, subject to existing public utility, pipe line, irrigation and drainage easements.

And I, Secretary of the Navy, do hereby state that the sum of money estimated by me to be just compensation for said lands and all improvements thereon and appurtenances thereunto belonging is Sixty-five thousand, four hundred four dollars and sixty-five cents (\$65,404.65), which sum is hereby deposited into the registry of the court for the use and benefit of the persons entitled thereto, and that the names of the owners of said property and improvements thereon which are hereby taken are shown on Schedule "A" which is attached hereto and made a part of this declaration of taking.

I am of the opinion that the ultimate award for the taking of said lands will be within the limits prescribed by Congress.

In Witness Whereof, the Petitioner, by and through the Secretary of the Navy, has caused this declaration of taking to be signed and the seal of

the Navy Department to be affixed hereto in the City of Washington, District of Columbia, this fifteenth day of January, 1945.

UNITED STATES  
OF AMERICA,

(Seal) By /s/ JAMES FORRESTAL. [115]

SCHEDULE "A"

The names of the persons having title to or other interest in the lands described in the within declaration of taking, and the amounts estimated to be fair compensation for each respective ownership, including all improvements thereon, are as follows:

Parcel	Name of Owner	Acres	Estimated Just Compensation
D-4	Estate of Samuel M. Damon	87.724	\$ 29,069.12
	Honolulu Plantation Co., Lessee		10,655.53
D-6	Estate of Samuel Damon	128.400	25,680.00
		<hr/> 216.124	<hr/> \$ 65,404.65

[Printer's Note: Exhibit "A" (description of land) attached to Declaration of Taking is similar to Exhibit "A" attached to Petition for Condemnation and set out at pages 75-82 of this printed Record.]

[Endorsed]: Filed Feb. 10, 1945.

[116]

In the District Court of the United States  
For the District of Hawaii

Civil No. 525

UNITED STATES OF AMERICA,

Petitioner,

vs.

216.124 ACRES OF LAND, more or less, in Moanalua, Honolulu, Oahu, Territory of Hawaii; John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, Deceased, et al.,  
Defendants.

ORDER AND JUDGMENT ON DECLARATION OF TAKING

It appearing that on the 10th day of August, 1944, the United States of America filed a petition for condemnation of certain lands described and shown on Exhibits "A" and "B" attached to Declaration of Taking; and

It further appearing that there was filed on the 10th day of February, 1945, a Declaration of Taking signed by James Forrestal, Secretary of the Navy, under and pursuant to provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), declaring taken the full fee simple

title, together with all improvements thereon and appurtenances thereunto belonging, as limited in the Declaration of Taking; that the uses of said land and improvements thereon and appurtenances thereunto belonging are those described in the said Declaration of Taking and in the Petition; and that the said Declaration of Taking sets forth the estimate of just compensation made pursuant to law and that contemporaneously with the filing of said Declaration of Taking, there was deposited in the registry of this Court for the use of the [124] persons entitled thereunto the sum of Sixty-five Thousand, Four Hundred Four Dollars and Sixty-five Cents (\$65,404.65),

It Is Ordered, Adjudged and Decreed that by virtue of the filing of said Declaration of Taking and the deposit of said money, fee simple title to the lands described and shown on Exhibits "A" and "B", attached to said Declaration of Taking, including all improvements and appurtenances upon said lands, as limited by the said Declaration of Taking, is indefeasibly vested in the United States of America; and

It Is Further Ordered that a copy of this Order be promptly served by the United States Marshal upon each of the defendants named and upon each and every person, company or corporation in possession of said land at the time possession was surrendered to the petitioner. The Marshal is further ordered to post a copy hereof in a conspicuous

place on the premises and to forthwith make due return of his said service to this Court.

Dated Honolulu, T. H., this 10th day of February, 1945.

/s/ J. FRANK McLAUGHLIN,

Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed Feb. 10, 1945.

[125]

In the District Court of the United States  
For the District of Hawaii

April Term 1944

Civil No. 527

UNITED STATES OF AMERICA,

Petitioner,

vs.

93.355 ACRES OF LAND, more or less, in Moanalua, Honolulu, Oahu, Hawaii, John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, et al.,

Defendants.

### PETITION FOR CONDEMNATION

To the Honorable, the Presiding Judges of the  
United States District Court for the District of  
of Hawaii:

Now comes the United States of America, by Charles F. Rathbun and Robert S. Tarney, Special Assistants to the Attorney General, acting under the instructions of the Attorney General of the United States and at the request of the Secretary of Navy of the United States. and respectfully represents to the Court:

#### I.

That this proceeding is instituted under the authority of divers and sundry Acts of Congress, among them the following:

The Act of Congress approved March 27, 1942 (Public Law 507—77th Congress)

The Act of Congress approved January 28, 1944 (Public Law 224—78th Congress)

and that the Secretary of Navy, acting under authority vested in him by law and pursuant to law, has determined that it is necessary to acquire for the United States of America by condemnation, under judicial process, certain land more particularly described in Exhibit "A", hereto annexed and made a part hereof as though set forth at length.

## II.

That the land sought to be condemned is located in Moanalua, Honolulu, Oahu, Territory of Hawaii, and lies wholly within the jurisdiction of the United States District Court for the Territory of Hawaii, together with all improvements thereon and appurtenances thereunto belonging, as described in said Exhibit "A".

## III.

That attached hereto and made a part hereof is a map or plat marked Exhibit "B", delineating said property.

## IV.

That the interest sought to be condemned is the full fee simple title to said land and all improvements thereon and appurtenances thereunto belonging, subject to existing public utility, pipe line, and irrigation and drainage easements and subject to the right of the public to use the boundary roads to the area.

## V.

That the said land and improvements thereon and appurtenances thereunto belonging are to be acquired under the authority of and for the purposes set forth in the various Acts of Congress hereinabove mentioned, and particularly for use as a storage area and in connection with the Naval Air Station, Honolulu, Hawaii.

## IV.

That the interests sought to be condemned is the title in fee simple absolute. [JFMc Amended 3-9-45]

## V.

That the said land is to be acquired under the authority of and for the purposes set forth in the various Acts of Congress hereinabove mentioned, and particularly for use as a storage area and in connection with the Naval Air Station, Honolulu, Hawaii. [JFMc Amended 3-9-45]

## VI.

That John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased; Honolulu Plantation Company, Albert Waterhouse, Gretchen Waterhouse, City and County of Honolulu and Territory of Hawaii are the owners of or claim to have some interest in said land.

## VII.

That the Secretary of Navy of the United States has determined that the utmost haste in expediting this project is vital to the War purposes of the

United States and he has therefore determined that immediate [128] possession of said land and all improvements thereon and appurtenances thereunto belonging, to the extent of the interest to be acquired therein, is necessary by the United States and that certain and adequate provisions have been made for the payment of just compensation which may be adjudged due for the condemnation of the land described in said Exhibits "A" and "B", and that the petitioner has been in actual possession of Parcels D-9 and D-10 described and shown in said Exhibits "A" and "B", from and since October 1, 1943 under a right of entry granted by John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased; and has likewise been in possession of Parcels D-7 and D-8, described and shown in said Exhibits "A" and "B", under a lease executed between the petitioner and John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, dated May 1, 1942, demising a term beginning on that date, which lease as extended expired June 30, 1944, and that petitioner has remained in possession from the date of expiration of said lease extended until the present time. That by said right of entry, it was provided that in case the Government should undertake to acquire any interest in the premises or any part thereof by condemnation proceedings, that the said

John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, would claim no damages or any interest in any improvements made to the premises by the petitioner, and further providing that the condition of the said premises as of the date of the right of entry should be taken for valuation purposes as the condition of the premises on the date of taking in said proceedings; that it was stipulated and agreed in said lease that on May 1, 1942, the property described herein was unimproved and vacant and that no claim would be made by the lessor for any damages or interest in any improvements placed upon the land by the Government or for any clearing, leveling or utility installations placed thereon by the United States.

Wherefore, your petitioner prays this Honorable Court to take jurisdiction of this cause and to make and enter all orders, judgments and decrees necessary to determine title of said real estate condemned, or any part thereof; and to fix and determine the just compensation due for the condemnation of the aforesaid lands; that the Court adjudge and determine that the immediate possession of said lands be taken to the extent of the interest being acquired herein for the War and Naval purposes of the United States; that upon payment into the registry of this Court for the United States for the use of the persons entitled thereto the sum adjudged to be full compensation for the said condemnation of said land, that in said lands there

be vested in the United States of America title in fee simple absolute; and that the Court make distribution of the final awards among the persons entitled thereto as expeditiously as may be and for such other and further relief as to the Court may seem just and proper in the premises.

UNITED STATES  
OF AMERICA,

By /s/ CHARLES F. RATHBUN,  
Special Asst. to the Atty. Gen.

By /s/ ROBERT S. TARNAY,  
Special Asst. to the Atty. Gen.

(Duly Verified.)

[130]

EXHIBIT "A"

PARCEL D-7

Being a portion of Lot C of Land Court Application  
1074 at Moanalua, Honolulu, Oahu, T. H.

Beginning at the Northeast corner of this parcel of land, on the new makai line of Dillingham Boulevard, said line established by Territory of Hawaii Condemnation Law No. 17049, filed June 19, 1943, and the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 9396.08 feet South and 3763.31 feet West and thence running by azimuths measured clockwise from True South:

1.  $9^{\circ} 07'$ —1361.60 feet along Lots B-484 to B-493 (inclusive) of Land Court Application 1074;
2.  $97^{\circ} 19'$ —1809.23 feet along the remainder of

- Lot C of Land Court Application 1074, along  
Parcels D-11, D-10 and D-8;
3.  $186^{\circ} 35' 30''$ —39.65 feet along the remainder  
of Lot C of Land Court Application 1074,  
along the East side of Territory of Hawaii  
Project No. DA-NR 10 (2), the same being  
established by Territory of Hawaii Condemna-  
tion Law No. 17194, filed November 26, 1943;
  4.  $189^{\circ} 03' 20''$ —1329.58 feet along the remain-  
der of Lot C of Land Court Application 1074,  
along the East side of Territory of Hawaii  
Project No. DA-NR 10 (2), the same being  
established by Territory of Hawaii Condemna-  
tion Law No. 17194, filed November 26, 1943;
  5. Thence along the remainder of Lot C of Land  
Court Application 1074, along Territory of  
Hawaii Project No. DA-NR 10 (2), the same  
being established by Territory of Hawaii Con-  
demnation Law No. 17194, filed November 26,  
1943, on a curve to the right with a radius of  
50.00 feet, the direct azimuth and distance be-  
ing  $234^{\circ} 03' 20''$  70.71 feet: [131]
  6.  $279^{\circ} 03' 20''$ —1761.44 feet along the new makai  
line of Dillingham Boulevard, said line estab-  
lished by Territory of Hawaii Condemnation  
Law No. 17049, filed June 19, 1943 to the point  
of beginning and containing an area of 57.728  
Acres.

Honolulu, T. H. July 24, 1944.

WRIGHT, HARVEY &  
WRIGHT,

By /s/ FRED E. HARVEY,  
Surveyor.

[132]

## PARCEL D-8

Being a portion of Lot C of Land Court Application 1074 at Moanalua, Honolulu, Oahu, T. H.

Beginning at the Northeast corner of this parcel of land, being also the Northwest corner of Parcel D-10, the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 10,673.43 feet South and 5401.24 feet West and thence running by azimuths measured clockwise from True South:

1.  $9^{\circ} 07'$ —600.00 feet along the remainder of Lot C of Land Court Application 1074, along Parcel D-10;
2.  $97^{\circ} 19'$ —1153.64 feet along the remainder of Lot C of Land Court Application 1074, along Parcel D-9;
3.  $189^{\circ} 03' 20''$ —58.55 feet along the remainder of Lot C of Land Court Application 1074, along the East side of Territory of Hawaii Project No. DA-NR 10 (2), the same being established by Territory of Hawaii Condemnation Law No. 17194, filed November 26; 1943;
4. Thence along the remainder of Lot C of Land Court Application 1074, along Territory of Hawaii Project No. DA-NR 10 (2), the same being established by Territory of Hawaii Condemnation Law No. 17194, filed November 26, 1943, on a curve to the right with a radius of 109-91 feet, the direct azimuth and distance being  $142^{\circ} 49' 25''$  152.06 feet;
5.  $186^{\circ} 35' 30''$ —432.74 feet along the remainder

- of Lot C of Land Court Application 1074, along the East side of Territory of Hawaii Project No. DA-NR 10 (2), the same being established by Territory of Hawaii Condemnation Law No. 17194, filed November 26, 1943;
6.  $277^{\circ} 19'$ —1282.75 feet along the remainder of Lot C of Land Court Application 1074, along Parcel D-7 to the point of beginning and containing an area of 17.281 Acres.

Honolulu, T. H. July 24, 1944.

WRIGHT, HARVEY &  
WRIGHT,

By /s/ FRED E. HARVEY,  
Surveyor.

[133]

PARCEL D-9

Being a portion of Lot C of Land Court Application 1074 At Moanalua, Honolulu, Oahu, T. H.

Beginning at the Northeast corner of this parcel of land, the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 11,265.85 feet South and 4596.31 feet West and thence running by azimuths measured clockwise from True South:

1.  $9^{\circ} 07'$ —252.35 feet along the remainder of Lot C of Land Court Application 1074, along Parcel D-10;
2.  $46^{\circ} 30' 30''$ —288.98 feet along John Rodgers Airport;
3.  $90^{\circ} 00'$ —1048.80 feet along United States Military Reservation;

4.  $180^{\circ} 00'$ —563.89 feet along United States Military Reservation;
5. Thence along the remainder of Lot C of Land Court Application 1074, along Territory of Hawaii Project No. DA-NR 10 (2), the same being established by Territory of Hawaii Condemnation Law No. 17194, filed November 26, 1943, on a curve to the right with a radius of 804.51 feet, the direct azimuth and distance being  $273^{\circ} 46' 30''$  148.08 feet;
6.  $189^{\circ} 03' 20''$ —41.45 feet along the remainder of Lot C of Land Court Application 1074, along the East side of Territory of Hawaii Project No. DA-NR 10 (2), the same being established by Territory of Hawaii Condemnation Law No. 17194, filed November 26, 1943;
7.  $277^{\circ} 19'$ —1153.64 feet along the remainder of Lot C of Land Court Application 1074, along Parcel D-8 to the point of beginning and containing an area of 14.914 Acres.

Honolulu, T. H. July 25, 1944.

WRIGHT, HARVEY &  
WRIGHT,

By /s/ FRED E. HARVEY,  
Surveyor.

[134]

## PARCEL D-10

Being a portion of Lot C of Land Court Application 1074 At Moanalua, Honolulu, Oahu, T. H.

Beginning at the Northwest corner of this parcel of land, being also the Northeast corner of Parcel D-8, the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 10,673.43 feet South and 4501.24 feet West and thence running by azimuths measured clockwise from True South:

1.  $277^{\circ} 19'$ —225.37 feet along the remainder of Lot C of Land Court Application 1074, along Parcel D-7;
2.  $9^{\circ} 07'$ —509.78 feet along the remainder of Lot C of Land Court Application 1074, along Parcel D-11;
3.  $99^{\circ} 07'$ —97.70 feet along the remainder of Lot C of Land Court Application 1074, along Parcel D-11;
4.  $9^{\circ} 07'$ —255.44 feet along the remainder of Lot C of Land Court Application 1074, along Parcel D-11;
5.  $122^{\circ} 30' 30''$ —45.49 feet along John Rodgers Airport;
6.  $46^{\circ} 30' 30''$ —141.32 feet along John Rodgers Airport;
7.  $189^{\circ} 07'$ —852.35 feet along the remainder of

Lot C of Land Court Application 1074, along  
Parcels D-9 and D-8 to the point of beginning  
and containing an area of 3.432 Acres.

WRIGHT, HARVEY &  
WRIGHT,

By /s/ FRED E. HARVEY,  
Surveyor.

Honolulu, T. H. July 24, 1944.

[Endorsed]: Filed Aug. 28, 1944.

[135]

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[Title of District Court and Cause No. 527.]

#### DECLARATION OF TAKING

Whereas, pursuant to the Acts of Congress approved March 27, 1942 (Public Law 507, 77th Congress), and January 28, 1944 (Public Law 224, 78th Congress), the above-styled condemnation proceeding has been instituted.

Now, Therefore, pursuant to the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), I, Secretary of the Navy, do hereby make and cause to be filed this declaration of taking, and by virtue of authority thereof do hereby state that the lands selected for acquisition aggregate 93.355 acres, more or less, at Moanalua, Honolulu, Oahu, Hawaii, more particularly described in Exhibit "A" attached hereto and made a part hereof. The lands are delineated on a map entitled, "Composite Boundary Map, Portions of the

Lands of the Estate of Emma Kaleleonalani, Deceased, at Halawa, Ewa, Oahu, T. H., and the Estate of S. M. Damon, Deceased, at Moanalua, Honolulu, Oahu, T. H.," designated as 14th N. D. Dwg. No. OA-N1-942, attached hereto as Exhibit "B" and made a part hereof. [137]

And I do declare said lands to be taken under the authority of the aforesaid Acts of Congress; that the use to which said lands are to be put is a storage area for use in connection with the Naval Air Station, Honolulu, Hawaii, as authorized by said Acts; and that the estate hereby taken in said lands is title in fee simple absolute.

And I, Secretary of the Navy, do hereby state that the sum of money estimated by me to be just compensation for said lands and all improvements thereon and appurtenances thereunto belonging is Forty-four thousand, eight hundred and ten dollars and forty cents (\$44,810.40), which sum is hereby deposited into the registry of the court for the use and benefit of the persons entitled thereto, and that the names of the owners of said property and improvements thereon which are hereby taken are shown on Schedule "A" which is attached hereto and made a part of this declaration of taking.

I am of the opinion that the ultimate award for the taking of said lands will be within the limits prescribed by Congress.

In Witness Whereof, the Petitioner, by and through the Secretary of the Navy, has caused this

declaration of taking to be signed and the seal of the Navy Department to be affixed hereto the thirteenth day of February, 1945, in the City of Washington, District of Columbia.

UNITED STATES  
OF AMERICA,

(Seal) By /s/ RALPH A. BARD,  
Acting Secretary of the Navy.

SCHEDULE "A"

The names of the persons having title to or other interest in the lands described in the within declaration of taking, and the amounts estimated to be fair compensation for each respective ownership, including all improvements thereon, are as follows:

Parcel	Name of Owner	Acres	Estimated Just Compensation
D-7	Samuel M. Damon Estate	57.728	\$ 44,810.40
D-8	" "	17.281	
<b>D-9</b>	" "	<b>14.914</b>	
<b>D-10</b>	" "	<b>3.432</b>	
Totals		93.355	\$ 44,810.40

[Printer's Note: Exhibit "A" (description of land) attached to Declaration of Taking is similar to Exhibit "A" attached to Petition for Condemnation and set out at pages 95 to 100 of this printed Record.]

[Endorsed]: Filed Mar. 9, 1945. [139]

In the District Court of the United States  
for the District of Hawaii

October Term 1944

Civil No. 527

UNITED STATES OF AMERICA,

Petitioner,

vs.

93.355 ACRES OF LAND, more or less, in Moanalua, Honolulu, Oahu, Hawaii, John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, et al.,

Defendants.

## ORDER AND JUDGMENT ON DECLARATION OF TAKING

It appearing that on August 28, 1944, the United States of America filed a petition for condemnation of certain lands described and shown on Exhibits "A" and "B", attached to the Declaration of Taking; and

It further appearing that there was filed on the 9th day of March, 1945, a Declaration of Taking signed by James Forrestal, Secretary of the Navy, under and pursuant to provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), declaring taken the title in fee simple absolute: that the uses of said land are those described in the said Declaration of Taking and in the Peti-

tion; and that the said Declaration of Taking sets forth the estimate of just compensation made pursuant to law and that contemporaneously with the filing of said Declaration of Taking, there was deposited in the registry of this Court for the use of the persons entitled thereunto the sum of Forty-four Thousand Eight Hundred Ten and 40/100 Dollars (\$44,810.40),

It is ordered, adjudged and decreed that by virtue of the filing of said Declaration of Taking and the deposit of said money, title in fee simple [147] absolute to the lands described and shown on Exhibits "A" and "B", attached to the said Declaration of Taking, is indefeasibly vested in the United States of America; and

It is further ordered that a copy of this Order be promptly served by the United States Marshal upon each of the defendants named and upon each and every person, company or corporation in possession of said land at the time possession was surrendered to the petitioner. The Marshal is further ordered to post a copy hereof in a conspicuous place on the premises and to forthwith made due return of his said service to this Court.

Dated: Honolulu, T. H., this 9th day of March, 1945.

/s/ J. FRANK McLAUGHLIN,  
Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed Mar. 9, 1945. [148]

[Title of District Court and Cause No. 527.]

ANSWER OF HONOLULU PLANTATION  
COMPANY

ONE OF THE DEFENDANTS ABOVE NAMED

Comes now Honolulu Plantation Company, a corporation, organized under the laws of the State of California, and doing business in the Territory of Hawaii, one of the defendants in the above entitled cause, and for answer to the petition filed herein says:

I.

That it has neither knowledge or information sufficient to form a belief as to the allegations set forth and contained in Paragraphs I, III, IV, V, VI and VII of said petition, and therefore it neither admits nor denies the same but leaves the petitioner to its proof thereof.

II.

That it admits the allegations contained in Paragraph II of said petition.

III.

That with respect to the allegations of said petition that it claims an interest in the property described in said petition this defendant admits the same and alleges that at the time of the [150] filing of said petition and until judgment or order was entered on declaration of taking filed in said causes it was the owner of an interest in the lands and in some of the improvements thereon and also admits that its lessor has an interest in the lands described in said petition which are under lease to this de-

fendant; that the lease creating such interest and estate will be submitted to the Court on the trial of said causes.

And this defendant further alleges as follows:

That for and during a period of over forty years this defendant has been continuously operating and conducting and is now operating and conducting a sugar mill and plantation at Aiea in the District of Ewa, Island of Oahu, T. H., and has been at all times during said period and now is engaged in the business of growing sugar cane and manufacturing sugar therefrom;

That most of the acreage of land taken, by reason of the fertility of the soil thereon, their low elevation, and the comparatively small expense with which they can be irrigated, is peculiarly adapted to the cultivation and growth of sugar cane, and that this defendant was at the time of the filing of the petition in this cause and until the date fixed for the surrendering of possession by the judgment or order on the Declaration of Taking entered in this cause and for many years prior thereto had been profitably using said lands for the cultivation and growth of sugar cane;

That the lands included within the area sought to be condemned which are held by this defendant under lease as aforesaid have a special and enhanced value by reason of the establishment by this defendant of a sugar mill and works, in close proximity to said lands, for the manufacture of sugar from cane grown and cultivated thereon and

on other lands owned and/or leased by this defendant and by reason of the development by this defendant of a water supply [151] for the irrigation of said lands, and other lands as aforesaid by means of artesian wells, pumping machinery and otherwise;

That for the purpose of cultivating the sand lands, this defendant has constructed improvements thereon;

That the parcel of land sought to be condemned by said petition in which this defendant has leasehold interest was at the time of the filing of the said petition in this cause and until judgment or order was entered on Declaration of Taking filed in this cause, and for many years prior thereto had been, occupied and cultivated by this defendant as integral parts of the sugar plantation operated and conducted by it at Aiea aforesaid and in connection with other large and contiguous tracts situated outside of the lands described in said petition but comprised within the said plantation and demised to this defendant by a number of leases and that by the taking of said lands described in the said petitions the integrity of said sugar plantation will be destroyed and the unitary value of the leasehold interests and estates of this defendant in such other and contiguous tracts of land will be greatly impaired and diminished.

Wherefore this defendant prays (1) that the damages suffered by this defendant by reason of the taking of the lands and properties described

in said petitions may be determined and the amount thereof be awarded to and paid to this defendant, and (2) for such other and general relief as may be meet and proper in the premises.

Dated: Honolulu, T. H., June 18, 1946.

HONOLULU PLANTATION  
COMPANY,

By VITOUSEK, PRATT & WINN,  
Its Attorneys,  
Defendant above named.

[Endorsed]: Filed June 18, 1946. [152]

In the District Court of the United States  
for the District of Hawaii

April Term 1944

Civil No. 529

UNITED STATES OF AMERICA,

Petitioner,

vs.

344.893 ACRES OF LAND, more or less, at Manana and Waiawa, Ewa, Oahu, Territory of Hawaii; Oahu Railway and Land Company, an Hawaiian Corporation, et al.,

Defendants.

### PETITION FOR CONDEMNATION

To the Honorable, the Presiding Judges of the United States District Court for the District of Hawaii.

Now comes the United States of America, by Robert S. Tarnay, Special Assistant to the Attorney General, acting under the instructions of the Attorney General of the United States and at the request of the Secretary of Navy and respectfully represents to the Court

#### I.

That this proceeding is instituted under the authority of divers and sundry acts of Congress, among them the following:

The Act of Congress approved March 27, 1942  
(Public Law 507—77th Congress)

The Act of Congress approved April 28, 1942  
(Public Law 528—77th Congress)

The Act of Congress approved June 26, 1943  
(Public Law 92—78th Congress)

and that the Secretary of Navy, acting under authority vested in him by law has determined that it is necessary that the United States of America acquire by condemnation by judicial process certain land, more particularly described in Exhibit "A", hereto annexed and made a part hereof as though set forth at length and shown upon the map marked Exhibit "B", also attached hereto. [154]

## II.

That the lands sought to be condemned are located at Manana and Waiawa, Ewa, Oahu. T. H., and lie wholly within the jurisdiction of this Court.

## III.

That the interests sought to be condemned in this action are as follows:

Parcels A-1, A-2, A-3, A-4, A-5, A-6, B-1, B-2, C-1 and C-2, described and shown on Exhibits "A" and "B"—full fee simple title and all improvements thereon and appurtenances thereunto belonging;

Parcel B-3, described and shown on Exhibits "A" and "B"—fee simple title to said land and all improvements thereon and appurtenances thereunto belonging, subject to public utility and pipeline easements and irrigation and drainage rights-of-way, if any, and also subject to the right of the public to use the boundary roads of the area;

Parcels A-7, A-8, A-9, A-10, B-4, B-5, B-6, B-7, B-8, B-9, E-1, E-2, E-3, E-4, E-5, F-1, F-2 and T-1, described and shown on Exhibits "A" and "B"—

fee simple title to said land and all improvements thereon and appurtenances thereunto belonging, subject to public utility, pipeline irrigation and drainage easements, and railroad easements, if any, and subject also to the right of the public to use the road delineated as Parcel B-7 and described and shown on Exhibits "A" and "B", attached hereto.

#### IV.

That the said land and improvements thereon and appurtenances thereunto belonging are to be acquired under the authority [155] of and for the purposes set forth in the various acts of Congress, hereinabove mentioned and particularly for use in connection with the Manana Construction Battalion Camp and Storage Area.

#### V.

That the Oahu Railway and Land Company, an Hawaiian corporation, the Hawaiian Land and Improvement Company, an Hawaiian corporation; George Miles Collins, John Kirkwood Clarke, Frank Elbert Midkiff, Edwin Puahaulani Murray, and Joseph Boyd Poindexter, Trustees of the Estate of Bernice P. Bishop, deceased; A. Lester Marks, Elizabeth Loy Marks, and Elizabeth Janet Cartwright McCandless, Trustees under the Will and Estate of L. L. McCandless, deceased; A. Lester Marks, Executor of the Estate of L. L. McCandless, deceased; and Bishop Trust Company, Ltd., an Hawaiian corporation, Administrator with the Will Annexed of the Estate of L. L. McCandless, deceased; Territory of Hawaii, City and

County of Honolulu; Honolulu Plantation Company, an Hawaiian corporation; the Hawaiian Land & Trust Company, Ltd., Honolulu, T. H., Trustee under the Will and of the Estate of Kahanu Meek, deceased; B. Nishioka, Meleiton Burduso, Temotio T. Tantel, Nonelon Balomalake, Semion Sapoan, Stanley Shimabukuro, K. Shimabukuro, Shiko Toma, Shizen Toma, Labuno Yamashiro, Kiki Asato, Tsumosuke Ishikawa, Kichini Yaboku, and Joseph Carvalho are the owners of, or claim to have some interest in, said land.

## VI.

That the Secretary of Navy of the United States has determined that the utmost haste in expediting this project is vital to the war purposes of the United States and he has, therefore, determined that immediate possession of Parcels B-4, B-5, B-6, B-7, B-8, A-7, A-8, A-9 and T-1 and all improvements thereon and appurtenances thereunto belonging, to the extent of the interest to be acquired therein, is necessary by the United [156] States and that certain and adequate provisions have been made for the payment of just compensation which may be adjudged due for the condemnation of the land described in and shown on said Exhibits "A" and "B".

That the Petitioner, under rights of entry, occupied two parts of Parcels B-3, thought at the time of the granting of said rights of entry to aggregate approximately five acres and fifty acres and subsequently found, upon survey, to aggregate in fact 7.84 and 56.96 acres, and Petitioner has been

in possession of said parts of Parcel B-3 from and since March 8, 1943 and February 12, 1944, respectively.

That the Petitioner has been in possession of Parcels A-1, A-3, A-4, A-5, A-6, B-1, B-2, C-1 and C-2 from and since April 20, 1944 under rights of entry.

That the Petitioner has been in possession of Parcels B-9, E-1, E-2, E-3, E-4, E-5, F-1 and F-2 from and since July 3, 1944 under rights of entry.

That the Petitioner has been in possession of Parcels A-2 and A-10 from and since June 17, 1942, under lease between the Petitioner and the Honolulu Plantation Company, dated June 17, 1942.

Wherefore, your Petitioner prays this Honorable Court to take jurisdiction of this cause and enter all orders, judgments and decrees necessary to determine title of said real estate condemned, or any part thereof, and to fix and determine that the continued possession of the lands identified in paragraph VI is necessary for the War and Naval purposes of the United States and that the immediate possession of the lands also identified in paragraph VI is likewise necessary for the War and Naval purposes of the United States; that upon payment into the registry of this Court for the use of the persons entitled thereunto of the sum adjudged to be full compensation for the [157] condemnation of said land, that title to said land be vested in the United States of America in fee simple, subject to the exceptions set forth in Paragraph III, and that the Court make distribution

of the final awards among the persons entitled thereto as expeditiously as may be and for such other and further relief as to the Court may seem just and proper in the premises.

UNITED STATES OF  
AMERICA,

By /s/ ROBERT S. TARNAY,  
Special Assistant to the  
Attorney General.

(Duly Verified.) [158]

EXHIBIT "A"

PARCEL A-1

Land Situated at Manana Uka, Ewa, Oahu, T. H.

Being a Portion of Grant 2060 to J. Raymond and L. Bernard.

Beginning at a pipe at the South corner of this parcel of land, being also the East corner of Parcel A-6, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 938.04 feet North and 2,918.36 feet East, and running by azimuths measured clockwise from true South.

1.  $110^{\circ} 19' 30''$ —203.83 feet along Parcel A-6, being also a remainder of Grant 2060 to J. Raymond and L. Bernard;
2.  $131^{\circ} 41'$ —671.91 feet along Parcel B-1, being also a portion of L. C. Aw. 7713, Apana 48 to V. Kamamalu;

3. 188° 06'—1254.00 feet along Parcel B-1, the land of Waiawa, L. C. Aw. 7713, Apana 46 to V. Kamamalu;
4. 188° 14'—717.29 feet along Parcel B-1, the land of Waiawa, L. C. Aw. 7713, Apana 46 to V. Kamamalu;
5. 292° 00'—1373.33 feet along a remainder of Grant 2060 to J. Raymond and L. Bernard and along Parcel A-9, being also a remainder of Grant 2060 to J. Raymond and L. Bernard, to a pipe;
6. 22° 00'—457.26 feet along Parcel A-2, being also a remainder of Grant 2060 to J. Raymond and L. Bernard, to a pipe;
7. 292° 00'—435.00 feet along Parcel A-2, being also a remainder of Grant 2060 to J. Raymond and L. Barnard, to a pipe;
8. 22° 00'—967.74 feet along Parcels A-4 and A-3, being also remainders of [159] Grant 2060 to J. Raymond and L. Bernard;
9. 112° 00'—60.00 feet along Parcel C-1, being also a remainder of Grant 2060 to J. Raymond and L. Bernard;
10. 22° 00'—225.00 feet along Parcel C-1, being also a remainder of Grant 2060 to J. Raymond and L. Bernard;
11. 112° 00'—440.00 feet along a remainder of Grant 2060 to J. Raymond and L. Bernard;
12. 22° 00'—484.33 feet along a remainder of Grant 2060 to J. Raymond and L. Bernard to

the point of beginning and containing a gross area of 63.893 acres and a net area of 62.852 acres, after excluding Exclusion 1 hereinafter described, and as delineated on 14th Naval District Drawing No. OA-N1-939.

Subject to Easements 1 and 2 hereinafter described, said easements being delineated on the aforesaid drawing.

### EXCLUSION 1

#### City and County Reservoir Lot

Being a Portion of Grant 2060 to J. Raymond and L. Bernard.

Beginning at a pipe at the East corner of this parcel of land, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 2,501.80 feet North and 3,418.00 feet East, and running by azimuths measured clockwise from true South:

1.  $22^{\circ} 00'$ —101.00 feet along a remainder of Grant 2060 to J. Raymond and L. Bernard to a pipe;
2.  $51^{\circ} 20'$ —170.00 feet along a remainder of Grant 2060 to J. Raymond and L. Bernard to a pipe;
3.  $141^{\circ} 20'$ —169.96 feet along a remainder of Grant 2060 to J. Raymond and L. Bernard to a pipe;
4.  $202^{\circ} 00'$ —165.93 feet along a remainder of Grant 2060 to J. Raymond and L. Bernard to a pipe;

5.  $292^{\circ} 00'$ —231.45 feet along a remainder of Grant 2060 to J. Raymond and L. Bernard to the point of beginning and containing an area of 1.041 acres, and as delineated on 14th Naval District Drawing No. OA-N1-939. [161]

### PARCEL A-2

Land Situated at Manana Uka, Ewa, Oahu, T. H.

Being a portion of Grant 2060 to J. Raymond and L. Bernard.

Beginning at a pipe at the South corner of this parcel of land, being also the North corner of Parcel A-4 and the West corner of Parcel A-5, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 2,305.69 feet North and 4,010.18 feet East, and running by azimuths measured clockwise from true South:

1.  $112^{\circ} 00'$ —435.00 feet along Parcel A-1, being also a remainder of Grant 2060 to J. Raymond and L. Bernard, to a pipe;
2.  $202^{\circ} 00'$ —457.26 feet along Parcel A-1, being also a remainder of Grant 2060 to J. Raymond and L. Bernard, to a pipe;
3.  $292^{\circ} 00'$ —435.00 feet along Parcel A-10, being also a remainder of Grant 2060 to J. Raymond and L. Bernard, to a pipe;
4.  $22^{\circ} 00'$ —457.26 feet along Parcel A-5, being also a portion of Grant 2060 to J. Raymond and L. Bernard, to the point of beginning and

containing an area of 4,566 acres, and as delineated on 14th Naval District Drawing No. OA-N1-939. [162]

### PARCEL A-3

Land Situated at Manana Uka, Ewa, Oahu, T. H.

Being a Portion of Grant 2060 to J. Raymond and L. Bernard.

Beginning at the North corner of this parcel of land, being also the West corner of Parcel A-4 and on the Easterly boundary of Parcel A-1, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 2,268.60 feet North and 3,995.20 feet East, and running by azimuths measured clockwise from true South:

1.  $292^{\circ} 00'$ —10.00 feet along Parcel A-4, being also a remainder of Grant 2060 to J. Raymond and L. Bernard;
2.  $22^{\circ} 00'$ —927.74 feet along the West side of Waimano Home Road;
3.  $112^{\circ} 00'$ —10.00 feet along Parcel C-2, being also a remainder of Grant 2060 to J. Raymond and L. Bernard;
4.  $202^{\circ} 00'$ —927.74 feet along Parcel A-1, being also a remainder of Grant 2060 to J. Raymond and L. Bernard, to the point of beginning and containing an area of 9,277 square feet, and as delineated on 14th Naval District Drawing No. OA-N1-939. [163]

## PARCEL A-4

Land Situated at Manana Uka, Ewa, Oahu, T. H.

Being a Portion of Grant 2060 to J. Raymond and L. Bernard.

Beginning at a pipe at the North corner of this parcel of land, being also the East corner of Parcel A-1, the South corner of Parcel A-2 and the West corner of Parcel A-5, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 2,305.69 feet North and 4,010.18 feet East, and running by azimuths measured clockwise from true South:

1.  $292^{\circ} 00'$ —10.00 feet along Parcel A-5, being also a remainder of Grant 2060 to J. Raymond and L. Bernard;
2.  $22^{\circ} 00'$ —40.00 feet along the West side of Wai-mano Home Road;
3.  $112^{\circ} 00'$ —10.00 feet along Parcel A-3, being also a remainder of Grant 2060 to J. Raymond and L. Bernard;
4.  $202^{\circ} 00'$ —40.00 feet along Parcel A-1, being also a remainder of Grant 2060 to J. Raymond and L. Bernard, to the point of beginning, and containing an area of 400 square feet, and as delineated on 14th Naval District Drawing No. OA-N1-939. [164]

## PARCEL A-5

Land Situated at Manana Uka, Ewa, Oahu, T. H.

Being a Portion of Grant 2060 to J. Raymond and L. Bernard.

Beginning at a pipe at the West corner of this parcel of land, being also the East corner of Parcel A-1, the South corner of Parcel A-2 and the North corner of Parcel A-4, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 2,305.69 feet North and 4,010.18 feet East, and running by azimuths measured clockwise from true South:

1.  $202^{\circ} 00'$ —457.26 feet along Parcel A-2, being also a remainder of Grant 2060 to J. Raymond and L. Bernard to a pipe;
2.  $292^{\circ} 00'$ —10.00 feet along a remainder of Grant 2060 to J. Raymond and L. Bernard;
3.  $22^{\circ} 00'$ —457.26 feet along the West side of Waimano Home Road;
4.  $112^{\circ} 00'$ —10.00 feet along Parcel A-4, being also a remainder of Grant 2060 to J. Raymond and L. Bernard, to the point of beginning and containing an area of 4,573 square feet, and as delineated on 14th Naval District Drawing No. OA-N1-939. [165]

## PARCEL A-6

Land Situated on the Northeast Side of Kamahameha Highway at Manana Uka,  
Ewa, Oahu, T. H.

Being a Portion of Grant 2060 to J. Raymond and L. Bernard.

Beginning at a pipe at the East corner of this parcel of land, being also the South corner of Parcel A-1, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 938.04 feet North and 2,918.36 feet East, and running by azimuths measured clockwise from true South:

1.  $22^{\circ} 00'$ —42.02 feet along a remainder of Grant 2060 to J. Raymond and L. Bernard;
2.  $110^{\circ} 19' 30''$ —95.20 feet along the Northeast side of Kamehameha Highway;
3.  $131^{\circ} 41'$ —115.32 feet along Parcel B-2, being also along L. C. Aw. 7713, Apana 48 to V. Kamamahu;
4.  $290^{\circ} 19' 30''$ —203.83 feet along Parcel A-1, being also a remainder of Grant 2060 to J. Raymond and L. Bernard, to the point of beginning and containing an area of 6,280 square feet, and as delineated on the 14th Naval District Drawing No. OA-N1-939. [166]

## PARCEL A-7

Land Situated at Manana Uka, Ewa, Oahu, T. H.

Being a Portion of Grant 2060 to J. Raymond and L. Bernard.

Beginning at a pipe at the West corner of this parcel of land, also the North corner of Parcel A-5, the East corner of Parcel A-2 and the South corner of Parcel A-10, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 2,729.65 feet North and 4,181.47 feet East, and running by azimuths measured clockwise from true South.

1. 202° 00'—659.80 feet along Parcel A-10, being also a remainder of Grant 2060 to J. Raymond and L. Bernard;
2. 292° 00'—10.00 feet along Parcel A-8, being also a remainder of Grant 2060 to J. Raymond and L. Bernard;
3. 22° 00'—659.80 feet along the West side of Waimano Home Road;
4. 112° 00'—10.00 feet along Parcel A-5, being also a remainder of Grant 2060 to J. Raymond and L. Bernard, to the point of beginning and containing an area of 6,598 square feet, and as delineated on 14th Naval District Drawing No. OA-N1-939. [167]

## PARCEL A-8

Land Situated at Manana Uka, Ewa, Oahu, T. H.

Being a Portion of Grant 2060 to J. Raymond and L. Bernard.

Beginning at a pipe at the North corner of this parcel of land, being also the East corner of Parcel A-9, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 3,656.65 feet North and 4,556.01 feet East, and running by azimuths measured clockwise from true South:

1.  $292^{\circ} 00'$ —10.00 feet along a remainder of Grant 2060 to J. Raymond and L. Bernard;
2.  $22^{\circ} 00'$ —340.00 feet along the West side of Waimano Home Road;
3.  $112^{\circ} 00'$ —10.00 feet along Parcel A-7, being also a remainder of Grant 2060 to J. Raymond and L. Bernard;
4.  $202^{\circ} 00'$ —340.00 feet along Parcel A-9, being also a remainder of Grant 2060 to J. Raymond and L. Bernard, to the point of beginning and containing an area of 3,400 square feet, and as delineated on 14th Naval District Drawing No. OA-N1-939. [168]

## PARCEL A-9

Land Situated at Manana Uka, Ewa, Oahu, T. H.

Being a Portion of Grant 2060 to J. Raymond and L. Bernard.

Beginning at a pipe at the East corner of this parcel of land, being also the North corner of Parcel A-8, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 3,656.65 feet North and 4,556.01 feet East, and running by azimuths measured clockwise from true South:

1.  $22^{\circ} 00'$ —340.00 feet along Parcel A-8, being also a remainder of Grant 2060 to J. Raymond and L. Bernard;
2.  $112^{\circ} 00'$ —435.00 feet along Parcel A-10, being also a remainder of Grant 2060 to J. Raymond and L. Bernard;
3.  $22^{\circ} 00'$ —659.80 feet along Parcel A-10, being also a remainder of Grant 2060 to J. Raymond and L. Bernard, to a pipe;
4.  $112^{\circ} 00'$ —1239.58 feet along Parcel A-1, being also a remainder of Grant 2060 to J. Raymond and L. Bernard, to a pipe;
5.  $202^{\circ} 00'$ —115.35 feet along a remainder of Grant 2060 to J. Raymond and L. Bernard to a pipe;
6.  $212^{\circ} 40'$ —900.00 feet along a remainder of Grant 2060 to J. Raymond and L. Bernard to a pipe;

7.  $292^{\circ} 00'$ —1508.00 feet along a remainder of Grant 2060 to J. Raymond and L. Bernard to the point of beginning and containing an area of 30.155 acres, and as delineated on 14th Naval District Drawing No. OA-N1-939. [169]

### PARCEL A-10

Land Situated at Manana Uka, Ewa, Oahu, T. H.

Being a Portion of Grant 2060 to J. Raymond and L. Bernard.

Beginning at a pipe at the South corner of this parcel of land, being also the East corner of Parcel A-2, the North corner of Parcel A-5 and the West corner of Parcel A-7, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 2,729.65 feet North and 4,181.47 feet East, and running by azimuths measured clockwise from true South:

1.  $112^{\circ} 00'$ —435.00 feet along Parcel A-2, being also a remainder of Grant 2060 to J. Raymond and L. Bernard, to a pipe;
2.  $202^{\circ} 00'$ —659.80 feet along Parcel A-9, being also a remainder of Grant 2060 to J. Raymond and L. Bernard;
3.  $292^{\circ} 00'$ —435.00 feet along Parcel A-9, being also a remainder of Grant 2060 to J. Raymond and L. Bernard;
4.  $22^{\circ} 00'$ —659.80 feet along Parcel A-7, being also a remainder of Grant 2060 to J. Raymond and L. Bernard, to the point of beginning and

containing an area of 6.589 acres, and as delineated on 14th Naval District Drawing No. OA-N1-939.

/s/ R. M. TOWILL,

Registered Professional Surveyor, Certificate Number 151.

Honolulu, T. H., August 22, 1944. [170]

### PARCEL B-1

Land Situated at Manana Iki and Waiwa, Ewa,  
Oahu, T. H.

Being a Portion of Royal Patent 4475, Land Commission Award 7713, Apana 46 to V. Kamamalu and a Portion of Royal Patent 4475, Land Commission Award 7713, Apana 48 to V. Kamamalu.

Beginning at a pipe at the Southwest corner of this parcel of land, being also the North corner of Parcel B-2, and on the new Northeast side of Kamahameha Highway, the coordinates of which referred to Government Survey of Triangulation Station "Ewa Church" being 1,207.78 feet North and 2,190.14 feet East, and running by azimuths measured clockwise from true South:

1.  $188^{\circ} 06'$ —55.33 feet along a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu; thence following along the middle of railroad track along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, for the next eight (8) courses; on a curve to the

left, with a radius of 260.54 feet, the chord azimuth and distance being,

2.  $121^{\circ} 47' 13''$ —143.22 feet;
3.  $105^{\circ} 50'$ —143.10 feet; thence on a curve to the right, with a radius of 309.79 feet, the chord azimuth and distance being,
4.  $130^{\circ} 45'$ —261.03 feet;
5.  $155^{\circ} 40'$ —281.50 feet; [171] thence on a curve to the left, with a radius of 521.07 feet, the chord azimuth and distance being,
6.  $145^{\circ} 28'$ —184.55 feet;
7.  $135^{\circ} 16'$ —491.60 feet; thence on a curve to the left, with a radius of 286.57 feet, the chord azimuth and distance being,
8.  $124^{\circ} 16'$ —109.36 feet;
9.  $113^{\circ} 16'$ —186.63 feet; thence
10.  $234^{\circ} 00'$ —1760.22 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu;
11.  $292^{\circ} 00'$ —181.67 feet along a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu;
12.  $8^{\circ} 14'$ —717.29 feet along Parcel A-1, being also along Grant 2060 to J. Raymond and L. Bernard;
13.  $8^{\circ} 06'$ —1254.00 feet along Parcel A-1, being also along Grant 2060 to J. Raymond and L. Bernard;
14.  $311^{\circ} 41'$ —671.91 feet along Parcel A-1, being also along Grant 2060 to J. Raymond and L. Bernard;
15.  $110^{\circ} 19' 30''$ —572.74 feet along Parcel B-2; being also a remainder of L. C. Aw. 7713,

Apana 48 to V. Kamamalu, to the point of beginning and containing an area of 40.424 acres, and as delineated on 14th Naval District Drawing No. OA-N1-939. [172]

### PARCEL B-2

Land Situated on the Northeast Side of Kamehameha Highway at Manana Iki, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 4475, Land Commission Award 7713, Apana 48 to V. Kamamalu.

Beginning at a pipe at the North corner of this parcel of land, being also the Southwest corner of Parcel B-1, and on the new Northeast side of Kamehameha Highway, the coordinates of which referred to Government Survey Triangular Station "Ewa Church" being 1,207.78 feet North and 2,190.14 feet East, and running by azimuths measured clockwise from true South:

1.  $290^{\circ} 19' 30''$ —572.74 feet along Parcel B-1, being also a remainder of L. C. Aw. 7713, Apana 48 to V. Kamamalu;
2.  $311^{\circ} 41'$ —115.32 feet along Parcel A-6, being also along Grant 2060 to J. Raymond and L. Bernard;
3.  $110^{\circ} 19' 30''$ —671.04 feet along the Northeast side of Kamehameha Highway;
4.  $188^{\circ} 06'$ —42.97 feet along the boundary between Manana Iki and Waiwa to the point of beginning and containing an area of 26,119

square feet, and as delineated on 14th Naval District Drawing No. OA-N1-939. [173]

### PARCEL B-3

Land Situated at Waiwa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 4475, Land Commission Award 7713, Apana 46 to V. Kamamalu.

Beginning at a pipe at the East corner of this parcel of land, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 3,770.52 feet North and 1,309.72 feet East, and running by azimuths measured clockwise from true South:

1.  $26^{\circ} 30'$ —144.00 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu;
2.  $35^{\circ} 30'$ —225.00 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu; thence along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right, with a radius of 600 feet, the chord azimuth and distance being,
3.  $47^{\circ} 40'$ —252.91 feet;
4.  $59^{\circ} 50'$ —504.00 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu; thence along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the

left, with a radius of 220.00 feet, the chord azimuth and distance being,

5.  $40^{\circ} 20'$ —146.88 feet; thence along Parcel B-4, being [174] also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right, with a radius of 350.00 feet, the chord azimuth and distance being,
6.  $28^{\circ} 30'$ —93.39 feet;
7.  $36^{\circ} 10'$ —778.00 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu; thence along Parcel B-4, being also a remainder of L. C. Aw. 7713, **Apana 46 to V. Kamamalu**, on a curve to the right, with a radius of 220.00 feet, the chord azimuth and distance being,
8.  $61^{\circ} 05'$ —185.37 feet; thence along Parcel B-4, being also a remainder of L. C. Aw. 7713, **Apana 46 to V. Kamamalu**, on a curve to the right, with a radius of 420.00 feet, the chord azimuth and distance being,
9.  $126^{\circ} 15'$ —542.74 feet; thence along Parcel B-4, being also a remainder of L. C. Aw. 7713, **Apana 46 to V. Kamamalu**, on a curve to the left, with a radius of 200.00 feet, the chord azimuth and distance being,
10.  $108^{\circ} 45'$ —338.29 feet;
11.  $51^{\circ} 00'$ —38.00 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu; thence along Parcel B-4, being also a remainder of L. C. Aw. 7713,

Apana 46 to V. Kamamalu, on a curve to the right, with a radius of 75.00 feet, the chord azimuth and distance being,

12.  $69^{\circ} 45'$ —48.22 feet; [175]
13.  $88^{\circ} 30'$ —106.00 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu; thence along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right, with a radius of 60.00 feet, the chord azimuth and distance being,
14.  $127^{\circ} 30'$ —75.52 feet;
15.  $166^{\circ} 30'$ —128.00 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu; thence along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right, with a radius of 180.00 feet, the chord azimuth and distance being,
16.  $192^{\circ} 32'$ —158.00 feet;
17.  $218^{\circ} 34'$ —352.00 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu;
18.  $208^{\circ} 40'$ —180.00 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu;
19.  $217^{\circ} 30'$ —180 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu;
20.  $230^{\circ} 20'$ —203.00 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu;

21.  $240^{\circ} 00'$ —300.00 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu;
22.  $225^{\circ} 20'$ —322.00 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu; thence along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the left, with a radius of 250.00 feet, the chord [176] azimuth and distance being,
23.  $210^{\circ} 30'$ —128.00 feet;
24.  $195^{\circ} 40'$ —130.00 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu; thence along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right, with a radius of 300.00 feet, the chord azimuth and distance being,
25.  $209^{\circ} 49' 45''$ —146.80 feet; thence along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right, with a radius of 230.00 feet, the chord azimuth and distance being,
26.  $253^{\circ} 51'$ —144.56 feet;
27.  $272^{\circ} 10'$ —57.62 feet along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, to a pipe;
28.  $295^{\circ} 17'$ —575.57 feet along Parcel B-6, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, to a pipe;
29.  $295^{\circ} 46'$ —691.20 feet along a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu to

the point of beginning and containing an area of 64.801 acres, and as delineated on 14th Naval District Drawing No. OA-N1-939. [177]

### PARCEL B-4

Land Situated at Waiawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 4475, Land Commission Award 7713, Apana 46 to V. Kama-malu.

Beginning at a pipe at the Northeast corner of this parcel of land, being also the North corner of Parcel B-1, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 3,475.11 feet North and 2,336.38 feet East, and running by azimuths measured clockwise from true South:

1.  $54^{\circ} 00'$ —1760.22 feet along Parcel B-1, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu; thence following along the middle of railroad track along Parcel B-1, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, for the next eight (8) courses;
2.  $293^{\circ} 16'$ —186.63 feet; thence on a curve to the right, with a radius of 286.57 feet, the chord azimuth and distance being,
3.  $304^{\circ} 16'$ —109.36 feet;
4.  $315^{\circ} 16'$ —491.60 feet; thence on a curve to the right, with a radius of 521.07 feet, the chord azimuth and distance being,
5.  $325^{\circ} 28'$ —184.55 feet;

6.  $335^{\circ} 40'$ —281.50 feet; thence on a curve to the left, [178] with a radius of 309.79 feet, the chord azimuth and distance being,
7.  $310^{\circ} 45'$ —261.03 feet;
8.  $285^{\circ} 50'$ —143.10 feet; thence on a curve to the right, with a radius of 260.54 feet, the chord azimuth and distance being,
9.  $301^{\circ} 47' 13''$ —143.22 feet; thence
10.  $8^{\circ} 06'$ —55.33 feet along Parcel B-1, being also a remainder of L. C. Aw. 7713, Apana 48 to V. Kamamalu, to a pipe;
11.  $110^{\circ} 19' 30''$ —194.97 feet along the Northeast side of Kamehameha Highway to a pipe; thence along the Northeast side of Kamehameha Highway, on a curve to the left, with a radius of 5,712.72 feet, the chord azimuth and distance being,
12.  $108^{\circ} 52' 15''$ —289.95 feet to a pipe;
13.  $107^{\circ} 25'$ —1426.77 feet along the Northeast side of Kamehameha Highway and Waiawa Cut-Off Road;
14.  $165^{\circ} 00'$ —47.35 feet along Parcel B-8, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu;
15.  $224^{\circ} 23'$ —87.62 feet along Parcel B-8, being also along L. C. Aw. 10942, Apana 1 to William Wallace;
16.  $130^{\circ} 21'$ —148.30 feet along Parcel B-8, being also along L. C. Aw. 10942, Apana 1 to William Wallace;
17.  $43^{\circ} 16'$ —81.90 feet along Parcel B-8, being also along L. C. Aw. 10942, Apana 1 to William Wallace;

18.  $121^{\circ} 04' 30''$ —59.65 feet along Parcel B-8, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu; [179]
19.  $88^{\circ} 40'$ —50.00 feet along Parcel B-8, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu;
20.  $87^{\circ} 06'$ —202.11 feet along Parcel B-8, being also along L. C. Aw. 10942, Apana 2 to William Wallace;
21.  $107^{\circ} 25'$ —594.72 feet along the Northeast side of Waiawa Cut-Off Road to a pipe;
22.  $17^{\circ} 25'$ —30.00 feet along Waiawa Cut-Off Road to a pipe;
23.  $107^{\circ} 25'$ —550.62 feet along the Northeast side of Waiawa Cut-Off Road to a pipe; thence along the Northeast side of Waiawa Cut-Off Road and 100-foot roadway, on a curve to the right, with a radius of 269.52 feet, the chord azimuth and distance being,
24.  $131^{\circ} 12' 30''$ —217.46 feet;
25.  $155^{\circ} 00'$ —74.75 feet along 100-foot roadway; thence along 100-foot roadway, on a curve to the right, with a radius of 450.00 feet, the chord azimuth and distance being.
26.  $183^{\circ} 50'$ —434.04 feet;
27.  $212^{\circ} 40'$ —936.96 feet along 100-foot roadway; thence along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right, with a radius of 75.00 feet, the chord azimuth and distance being,
28.  $238^{\circ} 55'$ —66.34 feet;

29.  $265^{\circ} 10'$ —82.53 feet along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu; thence along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, [180] on a curve to the left, with a radius of 240.00 feet, the chord azimuth and distance being,
30.  $253^{\circ} 40'$ —95.70 feet,
31.  $242^{\circ} 10'$ —247.00 feet along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu; thence along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the left, with a radius of 420.00 feet, the chord azimuth and distance being,
32.  $227^{\circ} 25'$ —213.87 feet;
33.  $212^{\circ} 40'$ —211.00 feet along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu; thence along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right, with a radius of 230.00 feet, the chord azimuth and distance being,
34.  $224^{\circ} 06'$ —91.18 feet; thence along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the left, with a radius of 300.00 feet, the chord azimuth and distance being,
35.  $29^{\circ} 49' 45''$ —146.80 feet;
36.  $15^{\circ} 40'$ —130.00 feet along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu; thence along Parcel B-3.

being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right, with a radius of 250.00 feet, the chord azimuth and distance [181] being,

37.  $30^{\circ} 30'$ —128.00 feet,
38.  $45^{\circ} 20'$ —322.00 feet along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu,
39.  $60^{\circ} 00'$ —300.00 feet along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu,
40.  $50^{\circ} 20'$ —203.00 feet along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu,
41.  $37^{\circ} 30'$ —180.00 feet along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu,
42.  $28^{\circ} 40'$ —180.00 feet along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu,
43.  $38^{\circ} 34'$ —352.00 feet along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, thence along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the left, with a radius of 180.00 feet, the chord azimuth and distance being,
44.  $12^{\circ} 32'$ —158.00 feet,
45.  $346^{\circ} 30'$ —128.00 feet along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, thence along Parcel B-3, being also a remainder of L. C. Aw. 7713,

Apana 46 to V. Kamamalu, on a curve to the left, with a radius of 60.00 feet, the chord azimuth and distance being,

46.  $307^{\circ} 30'$ —75.52 feet,
47.  $268^{\circ} 30'$ —106.00 feet along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, [182] thence along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the left, with a radius of 75.00 feet, the chord azimuth and distance being,
48.  $249^{\circ} 45'$ —48.22 feet;
49.  $231^{\circ} 00'$ —38.00 feet along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, thence along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right, with a radius of 200.00 feet, the chord azimuth and distance being,
50.  $288^{\circ} 45'$ —338.29 feet, thence along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the left, with a radius of 420.00 feet, the chord azimuth and distance being,
51.  $306^{\circ} 15'$ —542.74 feet; thence along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the left, with a radius of 220.00 feet, the chord azimuth and distance being,
52.  $241^{\circ} 05'$ —185.37 feet;
53.  $216^{\circ} 10'$ —778.00 feet along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46

to V. Kamamalu, thence along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the left, with a radius of 350.00 feet, the chord azimuth and distance being, [183]

54.  $208^{\circ} 30'$ —93.39 feet; thence along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right, with a radius of 220.00 feet, the chord azimuth and distance being,
55.  $220^{\circ} 20'$ —146.88 feet;
56.  $239^{\circ} 50'$ —504.00 feet along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu; thence along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the left, with a radius of 600.00 feet, the chord azimuth and distance being,
57.  $227^{\circ} 40'$ —252.91 feet;
58.  $215^{\circ} 30'$ —225.00 feet along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu;
59.  $206^{\circ} 30'$ —144.00 feet along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu;
60.  $286^{\circ} 03' 10''$ —1068.32 feet along a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu to the point of beginning and containing an area of 68.672 acres, and as delineated on 14th Naval District Drawing No. OA-N1-939.

Subject to a portion of Easement 3-A and the whole of Easement 3-B hereinafter described, said

easements being delineated on the aforesaid drawing. [184]

### PARCEL B-5

Land Situated at Waiawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 4475, Land Commission Award 7713, Apana 46 to V. Kamamalu.

Beginning at a pipe at the East corner of this parcel of land, being also the East corner of Parcel B-7, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 4,277.29 feet North and 694.87 feet East, and running by azimuths measured clockwise from true South:

1.  $83^{\circ} 44'$ —74.75 feet along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, thence along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right, with a radius of 360.00 feet, the chord azimuth and distance being,
2.  $98^{\circ} 57'$ —188.98 feet;
3.  $114^{\circ} 10'$ —56.71 feet along Parcel B-7, being also a remainder of L. C. Aw. 713, Apana 46 to V. Kamamalu; thence along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the left, with a radius of 370.00 feet, the chord azimuth and distance being,
4.  $103^{\circ} 10'$ —141.20 feet;

5.  $92^{\circ} 10'$ —134.00 feet along Parcel B-7, being also a remainder of L. C. Aw. 7713, [185] Apana 46 to V. Kamamalu, thence along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the left, with a radius of 270.00 feet, the chord azimuth and distance being,
6.  $62^{\circ} 25'$ —267.96 feet,
7.  $32^{\circ} 40'$ —211.00 feet along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, thence along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right, with a radius of 380.00 feet, the chord azimuth and distance being,
8.  $47^{\circ} 25'$ —193.50 feet,
9.  $62^{\circ} 10'$ —247.00 feet along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, thence along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right, with a radius of 200.00 feet, the chord azimuth and distance being,
10.  $73^{\circ} 40'$ —79.75 feet;
11.  $85^{\circ} 10'$ —17.85 feet along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, thence along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right with a radius of 35.00 feet, the chord azimuth and distance being,
12.  $148^{\circ} 55'$ —62.78 feet;

13.  $212^{\circ} 40'$ —149.04 feet along 100-foot roadway;  
[186] thence along 100-foot roadway, on a  
curve to the right, with a radius of 930.00 feet,  
the chord azimuth and distance being,
14.  $228^{\circ} 35' 30''$ —510.34 feet;
15.  $244^{\circ} 31'$ —826.50 feet along 100-foot roadway;
16.  $351^{\circ} 00'$ —55.10 feet along U. S. Naval Reser-  
vation, being also a remainder of L. C. Aw.  
7713, Apana 46 to V. Kamamalu;
17.  $300^{\circ} 00'$ —200.00 feet along U. S. Naval Reser-  
vation, being also a remainder of L. C. Aw.  
7713, Apana 46 to V. Kamamalu;
18.  $352^{\circ} 00'$ —230.00 feet along U. S. Naval Reser-  
vation, being also a remainder of L. C. Aw  
7713, Apana 46 to V. Kamamalu, to the point  
of beginning and containing an area of 7.143  
acres, and as delineated on 14th Naval District  
Drawing No. OA-N1-939. [187]

### PARCEL B-6

Land Situated at Waiawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 4475, Land  
Commission Award 7713, Apana 46 to V. Kama-  
malu.

Beginning at a pipe at the South corner of this  
parcel of land, being also on the Northeast bound-  
ary of Parcel B-3, the coordinates of which re-  
ferred to Government Survey Triangulation Sta-  
tion "Ewa Church" being 4,105.68 feet North and  
613.83 feet East, and running by azimuths meas-  
ured clockwise from true South:

1.  $115^{\circ} 17'$ —494.36 feet along Parcel B-3, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu;
2.  $272^{\circ} 10'$ —76.38 feet along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, thence along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right, with a radius of 330.00 feet, the chord azimuth and distance being,
3.  $283^{\circ} 10'$ —125.93 feet;
4.  $294^{\circ} 10'$ —56.71 feet along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, thence along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the left, with a radius of 400.00 feet, the chord azimuth and distance being,
5.  $278^{\circ} 57'$ —209.98 feet; [188]
6.  $263^{\circ} 44'$ —50.19 feet along Parcel B-7, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu,
7.  $25^{\circ} 17'$ —142.85 feet along a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu to the point of beginning and containing an area of 0.717 acre, and as delineated on 14th Naval District Drawing No. OA-N1-939. [189]

## PARCEL B-7

Land Situated at Waiawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 4475, Land Commission Award 7713, Apana 46 to V. Kamamalu.

Beginning at a pipe at the East corner of this parcel of land, being also the Southeast corner of Parcel B-5, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 4,277.29 feet North and 694.87 feet East, and running by azimuths measured clockwise from true South:

1.  $25^{\circ} 17'$ —46.94 feet along a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu,
2.  $83^{\circ} 44'$ —50.19 feet along Parcel B-6, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, thence along Parcel B-6, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right, with a radius of 400.00 feet, the chord azimuth and distance being,
3.  $98^{\circ} 57'$ —209.98 feet,
4.  $114^{\circ} 10'$ —56.71 feet along Parcel B-6, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, thence along Parcel B-6, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the left, with a radius of 330.00 feet, the chord azimuth and distance being,
5.  $103^{\circ} 10'$ —125.93 feet; [190]

6.  $92^{\circ} 10'$ —134.00 feet along Parcels B-6 and B-3 being also remainders of L. C. Aw. 7713, Apana 46 to V. Kamamalu, thence along Parcels B-3 and B-4, being also remainders of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the left, with a radius of 230.00 feet, the chord azimuth and distance being,
7.  $62^{\circ} 25'$ —228.26 feet;
8.  $32^{\circ} 40'$ —211.00 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, thence along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right, with a radius of 420.00 feet, the chord azimuth and distance being,
9.  $47^{\circ} 25'$ —213.87 feet;
10.  $62^{\circ} 10'$ —247.00 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, thence along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right, with a radius of 240.00 feet, the chord azimuth and distance being,
11.  $73^{\circ} 40'$ —95.70 feet;
12.  $85^{\circ} 10'$ —82.53 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, thence along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the left, with a radius of 75.00 feet, the chord azimuth and distance being,
13.  $58^{\circ} 55'$ —66.34 feet, [191]

14.  $212^{\circ} 40'$ —158.38 feet along 100-foot roadway, thence along Parcel B-5, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the left, with a radius of 35.00 feet, the chord azimuth and distance being,
15.  $328^{\circ} 55'$ —62.78 feet;
16.  $265^{\circ} 10'$ —17.85 feet along Parcel B-5, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, thence along Parcel B-5, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the left, with a radius of 200.00 feet, the chord azimuth and distance being,
17.  $253^{\circ} 40'$ —79.75 feet;
18.  $242^{\circ} 10'$ —247.00 feet along Parcel B-5, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, thence along Parcel B-5, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the left, with a radius of 380.00 feet, the chord azimuth and distance being,
19.  $227^{\circ} 25'$ —193.50 feet;
20.  $212^{\circ} 40'$ —211.00 feet along Parcel B-5, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, thence along Parcel B-5, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right with a radius of 270.00 feet, the chord azimuth and distance being,
21.  $242^{\circ} 25'$ —267.96 feet;
22.  $272^{\circ} 10'$ —134.00 feet along Parcel B-3, being

also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the right, with a radius of 370.00 feet, the chord azimuth and distance being,

23.  $283^{\circ} 10'$ —141.20 feet;
24.  $294^{\circ} 10'$ —56.71 feet along Parcel B-5, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, thence along Parcel B-5, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, on a curve to the left, with a radius of 360.00 feet, the chord azimuth and distance being,
25.  $278^{\circ} 57'$ —188.98 feet,
26.  $263^{\circ} 44'$ —74.75 feet along Parcel B-5, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, to the point of beginning and containing an area of 1.597 acres, and as delineated on 14th Naval District Drawing No. OA-N1-939. [193]

#### PARCEL B-8

Land Situated at Waiawa, Ewa, Oahu, T. H.

Being the Whole of Royal Patent 402, Land Commission Award 10942, Apana 1 to William Wallace, a Portion of Royal Patent 402, Land Commission Award 10942, Apana 2 to William Wallace and a Portion of Royal Patent 4475, Land Commission Award 7713, Apana 46 to V. Kamamalu.

Beginning at the South corner of this parcel of land, on the Northeast side of Waiawa Cut-Off

Road near the intersection of same with Kamehameha Highway, and on the Southwesterly boundary of Parcel B-4, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 1,796.35 feet North and 371.60 feet East, and running by azimuths measured clockwise from true South:

1.  $107^{\circ} 25'$ —63.76 feet along the Northeast side of Waiawa Cut-Off Road to a pipe,
2.  $197^{\circ} 25'$ —30.00 feet along Waiawa Cut-Off Road to a pipe;
3.  $107^{\circ} 25'$ —389.03 feet along the Northeast side of Waiawa Cut-Off Road,
4.  $267^{\circ} 06'$ —202.11 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu,
5.  $268^{\circ} 40'$ —50.00 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu; [194]
6.  $301^{\circ} 04' 30''$ —59.65 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu,
7.  $223^{\circ} 16'$ —81.90 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu,
8.  $310^{\circ} 21'$ —148.30 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu,
9.  $44^{\circ} 33'$ —87.62 feet along Parcel B-4, being also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu,
10.  $345^{\circ} 00'$ —47.35 feet along Parcel B-4, being

also a remainder of L. C. Aw. 7713, Apana 46 to V. Kamamalu, to the point of beginning and containing an area of 0.792 acre, and as delineated on 14th Naval District Drawing No. OA-N1-939.

Subject to a portion of Easement 3-A hereinafter described, said easement being delineated on the aforesaid drawing. [195]

### PARCEL B-9

Land Situated at Waiawa and Manana Iki, Ewa, Oahu, T. H.

Being Portions of Royal Patent 4475, Land Commission Award 7713, Apanas 46 and 48 to V. Kamamalu. The Whole of Royal Patent 209, Land Commission Award 9320 Apanas 1, 2 and 3 to Keoho and the Whole of Royal Patent 207, Land Commission Award 9372, Apanas 1 and 2 to Keiki.

Beginning at a pipe at the East corner of this parcel of land, on the Southwest side of Kamehameha Highway, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 845.62 feet North and 2,845.45 feet East, and running by azimuths measured clockwise from true South:

1.  $46^{\circ} 36'$ —639.17 feet along Grant 3725 to Oahu Railway and Land Co. and the government land of Kalanihale,
2.  $145^{\circ} 20'$ —175.00 feet along Parcel E-5, being also Grant 159 to J. Lovell and L. C. Aw. 9378, Apana 2 to Homaiikawaa;

3. 222° 33'—316.40 feet along Parcel E-1, being also L. C. Aw. 7732, Apana 2 to Manuiki for Kapae;
4. 129° 20'—30.00 feet along Parcel E-1, being also L. C. Aw. 7732, Apana 2 to Manuiki for Kapae;
5. 53° 30'—61.50 feet along Parcel E-1, being also L. C. Aw. 7732, Apana 2 to Manuiki for Kapae;
6. 140° 30'—20.00 feet along Parcel E-1, being also [196] L. C. Aw. 7732, Apana 2 to Manuiki for Kapae;
7. 64° 30'—45.00 feet along Parcel E-1, being also L. C. Aw. 7732, Apana 2 to Manuiki for Kapae;
8. 146° 28'—40.24 feet along Parcel E-1, being also L. C. Aw. 7732, Apana 2 to Manuiki for Kapae;
9. 43° 00'—46.20 feet along Parcel E-1, being also L. C. Aw. 7732, Apana 2 to Manuika for Kapae;
10. 48° 30'—155.00 feet along Parcel E-1, being also L. C. Aw. 7732, Apana 2 to Manuiki for Kapae;
11. 323° 00'—136.00 feet along Parcel E-1, being also L. C. Aw. 7732, Apana 2 to Manuiki for Kapae;
12. 72° 30'—93.00 feet along Parcel E-5, being also along L. C. Aw. 9378, Apana 2 to Homaiikawaa;
13. 45° 20'—106.00 feet along Parcel E-5, being also along L. C. Aw. 9378, Apana 2 to Homaiikawaa;

14.  $131^{\circ} 00'$ —41.60 feet along Parcel E-5, being also along Grant 159 to J. Lovell;
15.  $50^{\circ} 30'$ —52.20 feet along Parcel E-5, being also along Grant 159 to J. Lovell;
16.  $309^{\circ} 00'$ —20.50 feet along Parcel E-5, being also along Grant 159 to J. Lovell;
17.  $52^{\circ} 00'$ —140.60 feet along Parcel E-5, being also along Grant 159 to J. Lovell;
18.  $324^{\circ} 00'$ —43.00 feet along Parcel E-5, being also along Grant 159 to J. Lovell;
19.  $58^{\circ} 00'$ —66.00 feet along Parcel E-5, being also along Grant 159 to J. Lovell;
20.  $140^{\circ} 30'$ —77.40 feet along Parcel E-5, being also along L. C. Aw. 7723, Apana 1 to Hopee,
21.  $63^{\circ} 00'$ —184.00 feet along Parcel E-5, being also along L. C. Aw. 7723, Apana 1 to Hopee and Grant 159 to J. Lovell, [197]
22.  $45^{\circ} 30'$ —300.00 feet along Parcel E-5, being also along L. C. Aw. 7723, Apana 2 to Hopee, to the Northeasterly edge of Waiawa Stream, thence following along the Northeasterly edge of Waiawa Stream along a remainder of the land of Waiawa for the next nine (9) courses, the direct azimuth and distances between points along edge of said stream being,
23.  $106^{\circ} 09'$ —296.45 feet;
24.  $123^{\circ} 40'$ —540.00 feet;
25.  $160^{\circ} 00'$ —105.00 feet;
26.  $177^{\circ} 10'$ —360.00 feet;
27.  $179^{\circ} 00'$ —200.00 feet;

28.  $192^{\circ} 48' 30''$ —139.38 feet;
29.  $152^{\circ} 15'$ —305.00 feet;
30.  $99^{\circ} 00'$ —350.00 feet;
31.  $125^{\circ} 28'$ —61.28 feet to the South side of Kamehameha Highway, thence
32.  $178^{\circ} 29'$ —15.00 feet along Kamehameha Highway,
33.  $266^{\circ} 29'$ —128.37 feet along the South side of Kamehameha Highway, thence along the South side of Kamehameha Highway, on a curve to the right with a radius of 1,397.50 feet, the chord azimuth and distance being,
34.  $267^{\circ} 41' 30''$ —58.94 feet;
35.  $358^{\circ} 54'$ —20.00 feet along Kamehameha Highway, thence along the South side of Kamehameha Highway, on a curve to the right, with a radius of 1,377.50 feet, the chord azimuth and distance being,
36.  $271^{\circ} 58' 30''$ —147.78 feet; [198]
37.  $185^{\circ} 03'$ —20.00 feet along Kamehameha Highway, thence along the South side of Kamehameha Highway, on a curve to the right, with a radius of 1,397.50 feet, the chord azimuth and distance being,
38.  $281^{\circ} 12'$ —299.42 feet;
39.  $287^{\circ} 21'$ —100.03 feet along the Southwest side of Kamehameha Highway,
40.  $287^{\circ} 25'$ —289.76 feet along the Southwest side of Kamehameha Highway,
41.  $17^{\circ} 15'$ —5.00 feet along Kamehameha Highway,
42.  $287^{\circ} 25'$ —250.00 feet along the Southwest side of Kamehameha Highway,

43.  $197^{\circ} 25'$ —5.00 feet along Kamehameha Highway,
44.  $287^{\circ} 25'$ —250.00 feet along the Southwest side of Kamehameha Highway,
45.  $17^{\circ} 25'$ —5.00 feet along Kamehameha Highway,
46.  $287^{\circ} 25'$ —27.03 feet along the Southwest side of Kamehameha Highway; thence along the Southwest side of Kamehameha Highway, on a curve to the right with a radius of 5,595.72 feet, the chord azimuth and distance being,
47.  $288^{\circ} 52' 15''$ —284.01 feet;
48.  $290^{\circ} 19' 30''$ —86.90 feet along the Southwest side of Kamehameha Highway,
49.  $200^{\circ} 19' 30''$ —5.00 feet along Kamehameha Highway,
50.  $290^{\circ} 19' 30''$ —848.37 feet along the Southwest side of Kamehameha Highway to the point of beginning and containing a gross area of 43.251 acres and a net area of 40.330 acres, after deducting Parcels E-2, E-3, E-4 and F-1 herein-after described, and as delineated on 14th Naval District Dwg. No. OA-N1-939. [199]

Subject to Easements 3-D and 3-F and portions of Easements 3-C and 3-E hereinafter described, said easements being delineated on the aforesaid drawing.

/s/ R. M. TOWILL,

Registered Professional Survey Certificate Number  
151.

Honolulu, T. H., August 22, 1944. [200]

## PARCEL C-1

Land Situated at Manana Uka, Ewa, Oahu, T. H.

Being a Portion of Grant 2060 to J. Raymond and L. Bernard.

Beginning at a pipe at the South corner of this parcel of land, being also the West corner of Parcel C-2, and on the West side of Waimano Home Road, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 1,199.80 feet North and 3,563.38 feet East, and running by azimuths measured clockwise from true South:

1.  $112^{\circ} 00'$ —60.00 feet along a remainder of Grant 2060 to J. Raymond and L. Bernard,
2.  $202^{\circ} 00'$ —225.00 feet along Parcel A-1, being also a remainder of Grant 2060 to J. Raymond and L. Bernard,
3.  $292^{\circ} 00'$ —60.00 feet along Parcel A-1, being also a remainder of Grant 2060 to J. Raymond and L. Bernard,
4.  $22^{\circ} 00'$ —225.00 feet along Parcel C-2, being also a remainder of Grant 2060 to J. Raymond and L. Bernard, to the point of beginning and containing an area of 0.310 acres, and as delineated on 14th Naval District Drawing No. OA-N1-939. [201]

## PARCEL C-2

Land Situated at Manana Uka, Ewa, Oahu, T. H.

Being a Portion of Grant 2060 to J. Raymond and L. Bernard.

Beginning at a pipe at the West corner of this parcel of land, being also the South corner of Parcel C-1, and on the West side of Waimano Home Road, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 1,199.80 feet North and 3,563.38 feet East, and running by azimuths measured clockwise from true South:

1.  $202^{\circ} 00'$ —225.00 feet along Parcel C-1, being also a remainder of Grant 2060 to J. Raymond and L. Bernard,
2.  $292^{\circ} 00'$ —10.00 feet along Parcel A-3, being also a remainder of Grant 2060 to J. Raymond and L. Bernard,
3.  $22^{\circ} 00'$ —225.00 feet along the West side of Waimano Home Road;
4.  $112^{\circ} 00'$ —10.00 feet along Waimano Home Road to the point of beginning and containing an area of 2,250 square feet, and as delineated on 14th Naval District Drawing No. OA-N1-939.

/s/ R. M. TOWILL,

Registered Professional Survey Certificate Number  
151.

Honolulu, T. H., August 22, 1944. [202]

## PARCEL E-1

Land Situated at Manana Iki, Ewa, Oahu, T. H.

Being the Whole of Royal Patent 871, Land Commission Award 7732, Apana 2 to Manuiki for Kapae.

Beginning at the South corner of this parcel of land, being also the Northeast corner of Parcel E-5, and on the boundary of Parcel B-9, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 550.38 feet North and 2,281.51 feet East, and running by azimuths measured clockwise from true South:

1.  $143^{\circ} 00'$ —136.00 feet along Parcel B-9, being also a remainder of L. C. Aw. 7713, Apana 48 to V. Kamamalu,
2.  $228^{\circ} 30'$ —155.00 feet along Parcel B-9, being also a remainder of L. C. Aw. 7713, Apana 48 to V. Kamamalu,
3.  $223^{\circ} 00'$ —46.20 feet along Parcel B-9, being also a remainder of L. C. Aw. 7713, Apana 48 to V. Kamamalu;
4.  $326^{\circ} 28'$ —40.24 feet along Parcel B-9, being also a remainder of L. C. Aw. 7713, Apana 48 to V. Kamamalu;
5.  $244^{\circ} 30'$ —45.00 feet along Parcel B-9, being also a remainder of L. C. Aw. 7713, Apana 48 to V. Kamamalu;
6.  $320^{\circ} 30'$ —20.00 feet along Parcel B-9, being also a remainder of L. C. Aw. 7713, Apana 48 to V. Kamamalu;

7. 233° 30'—61.50 feet along Parcel B-9, being also a remainder of L. C. Aw. 7713, Apana 48 to V. Kamamalu;
8. 309° 20'—30.00 feet along Parcel B-9, being also [203] a remainder of L. C. Aw. 7713, Apana 48 to V. Kamamalu;
9. 42° 33'—316.40 feet along Parcel B-9, being also a remainder of L. C. Aw. 7713, Apana 48 to V. Kamamalu, to the point of beginning and containing an area of 0.700 acre, and as delineated on 14th Naval District Drawing No. OA-N1-939.

Subject to a portion of Easement 3-C hereinafter described, said easement being delineated on the aforesaid drawing. [204]

## PARCEL E-2

Land Situated at Waiawa, Ewa, Oahu, T. H.

Being the Whole of Royal Patent 875, Land Commission Award 9376, Apana 2 to Kupihea for Kumaihiwa, the Whole of Royal Patent 208, Land Commission Award 9377, Apana 2 to Lio, and a Portion of Royal Patent 875, Land Commission Award 9376, Apana 1 to Kupihea for Kumaihiwa, Situated Wholly Within and to be Excluded from Parcel B-9.

Beginning at the South corner of this parcel of land, being also the East corner of Parcel F-1, the coordinates of which referred to Government Survey, Triangulation Station "Ewa Church" being 763.90 feet North and 1,718.20 feet East, and run-

ning by azimuths measured clockwise from true South:

1.  $102^{\circ} 30'$ —104.06 feet along Parcel F-1, being also a remainder of L. C. Aw. 9376, Apana 1 to Kupihea for Kumaihiwa;
2.  $104^{\circ} 52'$ —42.00 feet along Parcel F-1, being also a remainder of L. C. Aw. 9376, Apana 1 to Kupihea for Kumaihiwa;
3.  $228^{\circ} 00'$ —107.34 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 46 to V. Kamamalu,
4.  $117^{\circ} 00'$ —132.00 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 46 to V. Kamamalu, [205]
5.  $207^{\circ} 00'$ —76.56 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 46 to V. Kamamalu,
6.  $297^{\circ} 00'$ —132.00 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 46 to V. Kamamalu,
7.  $296^{\circ} 00'$ —132.00 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 46 to V. Kamamalu,
8.  $27^{\circ} 00'$ —76.56 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 46 to V. Kamamalu,
9.  $116^{\circ} 00'$ —13.09 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 46 to V. Kamamalu,
10.  $40^{\circ} 00'$ —69.18 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 46 to V.

Kamamalu, to the point of beginning and containing an area of 0.705 acre, and as delineated on 14th Naval District Drawing No. OA-N1-939.

Subject to portions of Easements 3-C and 3-E hereinafter described, said easements being delineated on the aforesaid drawing. [206]

### PARCEL E-3

Land Situated at Waiawa, Ewa, Oahu, T. H.

Being the Whole of Royal Patent 208, Land Commission Award 9377, Apana 1 to Lio.

Situated Wholly Within and to be Excluded from Parcel B-9.

Beginning at the East corner of this parcel of land, on the Southwest boundary of Parcel F-1, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 622.62 feet North and 1,481.36 feet East, and running by azimuths measured clockwise from true South:

1.  $52^{\circ} 30'$ —63.36 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 46 to V. Kamamalu,
2.  $329^{\circ} 00'$ —52.80 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 46 to V. Kamamalu,
3.  $57^{\circ} 00'$ —62.70 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 46 to V. Kamamalu,
4.  $330^{\circ} 00'$ —19.80 feet along Parcel B-9, being

also along L. C. Aw. 7713, Apana 46 to V. Kamamalu,

5. 57° 00'—314.16 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 46 to V. Kamamalu,
6. 102° 23'—95.32 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 46 to V. Kamamalu,
7. 233° 30'—250.14 feet along Parcel B-9, being also along L. C. Aw. 9320, Apana 2 to Keoha and L. C. Aw. 7713, Apana 46 to V. Kamamalu.
8. 151° 00'—33.00 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 46 to V. Kamamalu,
9. 233° 00'—242.57 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 46 to V. Kamamalu and L. C. Aw. 9320, Apana 1 to Keoho,
10. 311° 00'—57.68 feet along Parcel F-1, being also along L. C. Aw. 9376, Apana 1 to Kupihea for Kumailhiwa, to the point of beginning and containing an area of 0.976 acre, and as delineated on 14th Naval District Drawing No. OA-N1-939.

Subject to a portion of Easement 3-E hereinafter described, said easement being delineated on the aforesaid drawing.

#### PARCEL E-4

Land Situated at Waiawa, Ewa, Oahu, T. H.

Being the Whole of Royal Patent 223, Land Commission Award 9373 to Kamoku.

Situated Wholly Within and to be Excluded from Parcel B-9.

Beginning at the East corner of this parcel of

- also along L. C. Aw. 7713, Apana 48 to V. Kamamalu;
13. 238° 00'—66.00 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 48 to V. Kamamalu;
  14. 144° 00'—43.00 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 48 to V. Kamamalu;
  15. 232° 00'—140.60 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 48 to V. Kamamalu;
  16. 129° 00'—20.50 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 48 to V. Kamamalu;
  17. 230° 30'—52.20 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 48 to V. Kamamalu;
  18. 311° 00'—41.60 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 48 to V. Kamamalu;
  19. 225° 20'—106.00 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 48 to V. Kamamalu;
  20. 252° 30'—93.00 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 48 to V. Kamamalu; [211]
  21. 325° 20'—175.00 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 48 to V. Kamamalu;
  22. 46° 36'—254.45 feet along the government land of Kalanihale, partly along Governor's Executive Order 910;

23. 338° 27'—92.20 feet along the government land of Kalanihale along Governor's Executive Order 910,
24. 321° 55' 30"—342.62 feet along the government land of Kalanihale along Governor's Executive Order 910 and partly along Parcel T-1 to the point of beginning and containing an area of 10.073 acres, and as delineated on 14th Naval District Drawing No. OA-N1-939.

/s/ R. M. TOWILL,

Registered Professional Surveyor Certificate Number 151.

Honolulu, T. H., August 22, 1944. [212]

### PARCEL F-1

Land Situated at Waiawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 875, Land Commission Award 9376, Apana 1 to Kupihea for Kumaihiwa.

Situated Wholly Within and to be Excluded from Parcel B-9.

Beginning at the East corner of this parcel of land, being also the South corner of Parcel E-2, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 763.90 feet North and 1,718.20 feet East, and running by azimuths measured clockwise from true South.

1. 40° 00'—161.82 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 46 to V. Kamamalu,

2. 316° 00'—13.86 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 46 to V. Kamamalu;
3. 41° 00'—99.00 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 46 to V. Kamamalu;
4. 131° 00'—169.60 feet along Parcel B-9, being also along L. C. Aw. 7713, Apana 46 to V. Kamamalu and also along Parcel E-3, being also L. C. Aw. 9377, Apana 1 to Lio and L. C. Aw. 9320, Apana 1 to Keoho;
5. 228° 00'—195.30 feet along Parcel B-9, being also along L. C. Aw. 9320, Apana 1 to Keoho and L. C. Aw. 7713, Apana 46 to V. Kamamalu;
6. 284° 52'—42.00 feet along Parcel E-2, being also a remainder of L. C. Aw. 9376. [213] Apana 1 to Kupihea for Kumaihiwa;
7. 282° 30'—104.06 feet along Parcel E-2, being also a remainder of L. C. Aw. 9376, Apana 1 to Kupihea for Kumaihiwa, to the point of beginning and containing an area of 0.770 acre, and as delineated on 14th Naval District Drawing No. OA-N1-939.

Subject to a portion of Easement 3-E hereinafter described, said easement being delineated on the afore-said drawing.

## PARCEL F-2

Land Situated at Manana Iki, Ewa, Oahu, T. H.  
Being the Whole of Royal Patent 238, Land  
Commission Award 9405 to Kanaau.

Beginning at the Southeast corner of this parcel

of land, and on the Southerly boundary of Parcel E-5, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 335.79 feet South and 2,230.12 feet East, and running by azimuths measured clockwise from true South:

1.  $91^{\circ} 00'$ —323.00 feet along Grant 222 to Naheana to the edge of Waiawa Stream; thence following along the edge of Waiawa Stream, the direct azimuth and distance between points on edge of said stream being,
2.  $141^{\circ} 31'$ —63.00 feet, thence
3.  $244^{\circ} 00'$ —52.80 feet along Parcel E-5, being also along Grant 159 to J. Lovell;
4.  $263^{\circ} 00'$ —83.16 feet along Parcel E-5, being also along Grant 159 to J. Lovell;
5.  $252^{\circ} 00'$ —225.72 feet along Parcel E-5, being also along Grant 159 to J. Lovell;
6.  $331^{\circ} 20'$ —52.72 feet along Parcel E-5, being also along Grant 159 to J. Lovell;
7.  $4^{\circ} 00'$ —112.00 feet along Parcel E-5, being also along Grant 159 to J. Lovell, to the point of beginning and containing an area of 0.857 acre, and as delineated on 14th Naval District Drawing No. OA-N1-939.

/s/ R. M. TOWILL,

Registered Professional Surveyor Certificate Number 151.

Honolulu, T. H., August 22, 1944. [215]

## PARCEL T-1

Land Situated at Manana Iki, Ewa, Oahu, T. H.

Being a Portion of the Government Land of Kalanihale and Being Also a Portion of Governor's Executive Order 910.

Beginning at a pipe at the South corner of this parcel of land, being also the East corner of Parcel E-5, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 123.84 feet South and 2,441.33 feet East, and running by azimuths measured clockwise from true South:

1.  $141^{\circ} 55' 30''$ —93.33 feet along Parcel E-5, being also along Grant 159 to J. Lovell;
2.  $292^{\circ} 00'$ —78.91 feet along a remainder of the government land of Kalanihale, being also a remainder of Governor's Executive Order 910;
3.  $19^{\circ} 34'$ —46.60 feet along the land of Kaholona, being also L. C. Aw. 9305, Part 12 to P. Kanoa, to the point of beginning and containing an area of 1,837 square feet, and as delineated on 14th Naval District Drawing No. OA-N1-939.

/s/ R. M. TOWILL,

Registered Professional Surveyor Certificate Number 151.

Honolulu, T. H., August 22, 1944. [216]

## EASEMENT 1

Being a Roadway Forty (40.0) Feet Wide in Favor of the City and County of Honolulu.

Beginning at a pipe at the East corner of this

parcel of land, being also the South corner of Parcel A-2, the North corner of Parcel A-4 and the West corner of Parcel A-5, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 2,305.69 feet North and 4,010.18 feet East, and running by azimuths measured clockwise from true South:

1. 22° 00'—40.00 feet along Parcel A-4, being also a remainder of Grant 2060 to J. Raymond and L. Bernard;
2. 112° 00'—853.98 feet along a remainder of Grant 2060 to J. Raymond and L. Bernard, partly along Exclusion 1, to a pipe;
3. 202° 00'—40.00 feet along a remainder of Grant 2060 to J. Raymond and L. Bernard,
4. 292° 00'—853.98 feet along a remainder of Grant 2060 to J. Raymond and L. Bernard, partly along Parcel A-2, to the point of beginning and containing an area of 0.784 acre, and as delineated on 14th Naval District Drawing No. OA-N1-939. [217]

## EASEMENT 2

Description of Centerline of Pipeline Right-of-Way in Favor of the City and County of Honolulu.

Beginning at the North end of this easement, on the Southeast boundary of Exclusion 1 (City and County Reservoir Lot), the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 2,362.55 feet North and 3,323.16 feet East, and running by an azimuth measured clockwise from true South:

1.  $12^{\circ} 15'$ —1002.58 feet to the Southerly boundary of Parcel A-1, and as delineated on 14th Naval District Drawing No. OA-N1-939.

### EASEMENT 3-A

Description of Centerline of Electric Transmission Line for Hawaiian Electric Co., Ltd.

Beginning at the East end of this easement, on the Southerly boundary of Parcel E-4, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 1,605.09 feet North and 981.28 feet East, and running by azimuths measured clockwise from true South:

1.  $113^{\circ} 41'$ —83.86 feet; [218]
2.  $107^{\circ} 14'$ —231.79 feet;
3.  $114^{\circ} 02'$ —332.44 feet;
4.  $109^{\circ} 40'$ —1718.60 feet;
5.  $127^{\circ} 12'$ —152.39 feet to the Westerly boundary of Parcel B-4, the true azimuth and distance to a pipe marking the end of the 25th course of Parcel B-4 being  $336^{\circ} 54' 54''$  30.07 feet, and as delineated on 14th Naval District Drawing No. OA-N1-939.

### EASEMENT 3-B

Description of Centerline of Electric Transmission Line for Hawaiian Electric Co., Ltd.

Beginning at the East end of this easement, on the Southerly boundary of Parcel B-4, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 2,024.05 feet North and 254.08 feet West, and running by azimuths measured clockwise from true South.

1.  $110^{\circ} 22'$ —276.58 feet;
2.  $109^{\circ} 12'$ —783.80 feet;
3.  $127^{\circ} 12'$ —86.87 feet to the Westerly boundary of Parcel B-4, the true azimuth and distance to a pipe marking the end of the 25th course of Parcel B-4 being  $155^{\circ} 00' 60.79$  feet, and as delineated on 14th Naval District Drawing No. OA-N1-939. [219]

### EASEMENT 3-C

Description of Centerline of Electric Transmission Line for Hawaiian Electric Co., Ltd.

Beginning at the East end of this easement, on the Southeast boundary of Parcel B-9, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 624.09 feet North and 2,611.20 feet East, and running by an azimuth measured clockwise from true South:

1.  $105^{\circ} 07'$ —1964.40 feet to the edge of Waiawa Stream, the true azimuth and distance to the end of the 28th course of Parcel B-9 being  $192^{\circ} 48' 30'' 80.23$  feet, and as delineated on 14th Naval District Drawing No. OA-N1-939.

### EASEMENT 3-D

Description of Centerline of Electric Transmission Line for Hawaiian Electric Co., Ltd.

Beginning at the North end of this easement, on the Northeast boundary of Parcel B-9, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 1,073.63 feet North and 2,229.89 feet East, and running by

azimuths measured [220] clockwise from true South:

1.  $7^{\circ} 40' 30''$ —114.22 feet;
2.  $20^{\circ} 51' 30''$ —222.40 feet to the centerline of Easement 3-C, the true azimuth and distance to the initial point of Easement 3-C being  $285^{\circ} 07'$  492.80 feet, and as delineated on 14th Naval District Drawing No. OA-N1-939.

### EASEMENT 3-E

Description of Centerline of Electric Transmission Line for Hawaiian Electric Co., Ltd.

Beginning at the Northeast end of this easement, on the centerline of Easement 3-C, the true azimuth and distance from the initial point of Eastment 3-C being  $105^{\circ} 07'$  858.70 feet, and the coordinates of said point of beginning referred to Government Survey Triangulation Station "Ewa Church" being 848.03 feet North and 1,782.21 feet East, and running by an azimuth measured clockwise from true South:

1.  $48^{\circ} 33'$ —955.20 feet to the edge of Waiawa Stream, the true azimuth and distance to the end of the 23rd course of Parcel B-9 being  $303^{\circ} 40'$  170.62 feet, and as delineated on 14th Naval District Drawing No. OA-N1-939. [221]

### EASEMENT 3-F

Description of Centerline of Electric Transmission Line for Hawaiian Electric Co., Ltd.

Beginning at the East end of this easement, on the Northeast boundary of Parcel B-9, the coor-

dinates of which referred to Government Survey Triangulation Station "Ewa Church" being 1,498.21 feet North and 947.75 feet East, and running by azimuths measured clockwise from true South:

1.  $105^{\circ} 15'$ —230.47 feet;
2.  $122^{\circ} 39'$ —14.15 feet to the Northeast boundary of Parcel B-9, the true azimuth and distance to the end of the 38th course of Parcel B-9 being  $284^{\circ} 59' 30''$  115.01 feet, and as delineated on 14th Naval District Drawing No. OA-N1-939.

/s/ R. M. TOWILL,

Registered Professional Surveyor Certificate Number 151.

Honolulu, T. H., August 22, 1944.

[Endorsed]: Filed Sept. 7, 1944. [222]

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[Title of District Court and Cause No. 529.]

### DECLARATION OF TAKING

Whereas, pursuant to the authority of the Acts of Congress approved March 27, 1942 (Public Law 507, 77th Congress), April 28, 1942 (Public Law 528, 77th Congress), and June 26, 1943 (Public Law 92, 78th Congress), the above styled condemnation proceeding has been instituted.

Now, Therefore, pursuant to the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), I, Secretary of the Navy, do hereby make and cause to be filed this declaration of taking, and by virtue of authority thereof do hereby state that the lands selected for acquisition aggre-

gate 344.897 acres, more or less, at Manana and Waiawa, Ewa, Oahu, Territory of Hawaii, more particularly [224] Exhibit "A" attached hereto and made a part hereof. The lands are delineated on a map entitled "Boundary Map, Manana C. B. Camp and Storage Area," 14th Naval District Dwg. No. OA-N1-939, attached hereto as Exhibit "B" and made a part hereof.

And I do declare said lands to be taken under the authority of the aforesaid Acts of Congress; that the use to which said lands are to be put is in connection with the Manana Construction Battalion Camp and Storage Area; and that the estate hereby taken in said lands is as follows:

"1. As to Parcels A-2, A-3, A-5, A-6, A-7, A-8, A-9, A-10, B-1, B-2, B-3, B-5, B-6, C-1, C-2, E-1, E-2, F-1 and F-2, including all improvements thereon and appurtenances thereunto belonging, full fee simple title;

2. As to Parcels A-1, A-4, B-4, B-7, B-8, B-9, E-3, E-4, E-5, and T-1, including all improvements thereon and appurtenances thereunto belonging, fee simple title, subject, however, to the following:

Parcels A-1 and A-4

(a) Perpetual access easement (to and from Exclusion 1 as delineated on Exhibit "B") of the City and County of Honolulu acquired by deed dated July 25, 1932, recorded in Liber 1174, page 82 of the Bureau of Conveyances of the Territory of Hawaii; said access easement being by way of Parcel A-4 and along the right of way described

in [225] Exhibit "A" and delineated on Exhibit "B", both attached hereto, as Easement No. 1, and reserving to the said City and County of Honolulu the right to permit the operation, maintenance and repair of public utility facilities over, under and along said access easement, said access easement to be used in common with the Government and its permittees.

### Parcel A-1

(b) Perpetual easement of the City and County of Honolulu, acquired by deed dated July 25, 1932, recorded in Liber 1174, page 82 of the Bureau of Conveyances of the Territory of Hawaii, for the operation, maintenance, and repair of a pipe line, together with the right of ingress and egress for such purposes, the centerline of which is described in Exhibit "A" and delineated on Exhibit "B" attached hereto, as Easement 2.

### Parcels B-4, B-8 and B-9

(c) The existing right of the Hawaiian Electric Company, Limited, its successors and assigns, to operate, maintain, and repair electric power transmission poles and wire lines, together with the right of ingress and egress for such purposes, over the rights of way, the centerlines of which are described in Exhibit "A" and delineated on Exhibit "B", attached hereto, as Easements 3-A, 3-B, and [226] 3-F; said right having been acquired by the said Hawaiian Electric Company, Limited, from the Trustees under the Will and of the Estate of

Bernice P. Bishop, Deceased, by instrument dated July 31, 1944, and recorded in Liber 1852, pages 19 and 29, in the Bureau of Conveyances of the Territory of Hawaii.

(d) The right hereby reserved unto,

(1) George Miles Collins, John Kirkwood Clarke, Frank Elbert Midkiff, Edwin Pauhaulani Murray, and Joseph Boyd Poindexter, as Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, and to their successors in trust and assigns, as to Parcel B-9; and

(2) A. Lester Marks, Elizabeth Loy Marks, and Elizabeth Janet Cartwright McCandless, as Trustees under the Will and of the Estate of L. L. McCandless, Deceased, and to their successors in trust and assigns, as to Parcels E-3, E-4, and E-5; and to

(3) The City and County of Honolulu, a municipal corporation of the Territory of Hawaii, and its assigns, as to Parcel T-1, to operate, maintain, and repair, electric power transmission poles and wire lines, together with the rights of way, the center-lines of which are described in Exhibit "A", and delineated on [227] Exhibit "B", attached hereto, as Easement 3-C, for so long only as the said rights of way over which said facilities pass are used for such purposes.

(e) The right hereby reserved to the present fee owners their successors, assigns, and permittees, to use Parcel B-7 as a roadway in common, however, with the United States of America and its permittees."

And I, Secretary of the Navy, do hereby state

that the sum of money estimated by me to be just compensation for said lands and all improvements thereon and appurtenances thereunto belonging, is one hundred forty-three thousand two hundred four dollars and fifteen cents (\$143,204.15), which sum is hereby deposited into the registry of the court for the use and benefit of the persons entitled thereto, and that the names of the owners of said property and improvements thereon which are hereby taken are shown on Schedule "A" attached hereto and made a part hereof.

I am of the opinion that the ultimate award for the taking of said lands will be within the limits prescribed by Congress.

In Witness Whereof, the petitioner, by and through the Secretary of the Navy, has caused this declaration of taking to be signed on the 18th day of August, 1945, in the City of Washington, District of Columbia.

UNITED STATES OF  
AMERICA,

By /s/ JAMES FORRESTAL. [228]

SCHEDULE "A"

The names of the persons having title to or other interest in the lands described in the within declaration of taking, and the amounts estimated to be fair compensation for each respective ownership, including all improvements thereon, are as follows:

Parcel	Name of Owner	Acres	Estimated Just Compensation
A-1 to A-10 inclusive	Hawaiian Land and Improvement Co. Ltd.	104.862	\$ 47,187.90
B-1 to B-9 inclusive	Trustees of B. P. Bishop Estate	225.081	90,032.40
E-1 to E-5 inclusive	L. L. McCandless Estate	12.924	5,169.60
C-1 and C-2	Oahu Railway & Land Co.	0.361	162.45
F-1 and F-2	Honolulu Plantation Co.	1.627	650.80
T-1	City and County of Honolulu	0.042	1.00
Total		344.897	\$143,204.15

[Printer's Note: Exhibit "A" attached to Declaration of Taking is similar to Exhibit "A" attached to Petition for Condemnation and is set out at pages 115-171 with the exception of Easement 3-C which is set out below.]

### EASEMENT 3-C

Description of Centerline of Electric Transmission Line for Hawaiian Electric Co., Ltd.

Being easements twenty-two (22) feet wide, running over and across Parcels T-1, E-5, B-9, E-3 and E-4 of the U. S. Navy Acquisition under Civil Suit No. 529, same being portions of Territorial Government land of Kalanihale, Grant 159 to J. Lovell, R. P. 6240, L. C. Aw. 7723, Apana 2 to Hopee, R. P. 4475, L. C. Aw. 7713, Apana 46 to V. Kamamalu, R. P. 208, L. C. Aw. 9377, Apana 1 to Lio, R. P. 209, L. C. Aw. 9320, Apana 2 to Keoho and R. P. 223, L. C. Aw. 9373 to Kamoku.

Situated at Manana-Iki and Waiawa, Ewa, Oahu.

## Part 1

Beginning at the Easterly end of this center line, at a point on the East boundary of the U. S. Navy Acquisition under Civil Suit No. 529 and on the Westerly end of Second St., the coordinates of said point of beginning referred to Government Survey Triangulation Station "Ewa Church" being 131.26 feet South and 2438.51 feet East and thence running by azimuths measured clockwise from True South:

1.  $113^{\circ} 01'$ —141.14 feet;
2.  $112^{\circ} 00'$ —322.00 feet parallel to and twenty-two (22) feet Southwest of the proposed center line of Second St. Extension;
3.  $112^{\circ} 00'$ —845.24 feet parallel to and twenty-two (22) feet Southwest of the proposed center line of Second St. Extension;
4.  $112^{\circ} 00'$ —519.94 feet parallel to and twenty-two (22) feet Southwest of the proposed center line of Second St. Extension; [291]
5.  $179^{\circ} 28'$ —494.60 feet;
6.  $113^{\circ} 08'$ —41.46 feet to the West boundary of the U. S. Navy Acquisition and the East bank of Waiawa Stream, said point being 1006.83 feet North and 701.55 feet East of Government Survey Triangulation Station "Ewa Church".

## Part 2

Beginning at the end of Course 1 of Part 1 above described and running therefrom:

1.  $273^{\circ} 55'$ —146.48 feet to the East boundary of

the U. S. Navy Acquisition and the Westerly end of Second St.

### Part 3

Beginning at the end of Course 2 of Part 1 above described and running therefrom:

1.  $187^{\circ} 02'$ —65.00 feet.

### Part 4

Beginning at the end of Course 3 of Part 1 above described and running therefrom:

1.  $48^{\circ} 13'$ —217.09 feet to the South boundary of the U. S. Navy Acquisition and the North bank of Waiawa Stream, said point being 216.54 feet North and 1064.48 feet East of Government Survey Triangulation Station "Ewa Church".

Together with an additional easement for guy purposes on three areas, circular in shape, one circle each centering on the end of Courses 1, 4 and 5 of Part 1 above described and having a radius of fifteen (15) feet, thirty (30) feet and forty (40) feet, respectively; save and except any portions of said circular areas which conflict with the proposed extension of Second St. of which do not lie within the U. S. Navy Acquisition, and as delineated on 14th Naval District Drawing No. OA-N1-939.

[Endorsed]: Filed Sept. 17, 1945.

[292]

[Title of District Court and Cause No. 529]

MOTION FOR ORDER AMENDING  
PETITION IN CONDEMNATION

Now comes the Petitioner, United States of America, by its Attorney, Charles F. Rathbun, Special Assistant to the Attorney General, and moves that this Court enter an Order Amending the Petition in Condemnation herein by striking Exhibits "A" and "B" attached to said Petition and substituting therefore Exhibits "C" and "D", hereto attached, as a part of said Petition, and by striking from said Petition in the 1st, 2nd, 3rd and 4th lines from the bottom of page 1 the following words:

"more particularly described in Exhibit "A" hereto annexed and made a part hereof as though set forth at length and shown upon the map marked Exhibit "B", also attached hereto."

and substituting for said words after the words "certain land" in the 4th line from the bottom thereof, [294]

"more particularly described in Exhibit "C" hereto annexed and made a part hereof as though set forth at length and shown upon the map marked Exhibit "D", also attached hereto."

and by striking all of Paragraph III of said Petition in Condemnation and substituting therefore a new Paragraph III as follows:

"That the estate sought to be taken in said lands is as follows:

1. As to Parcels A-2, A-3, A-5, A-6, A-7, A-8, A-9, A-10, B-1, B-2, B-3, B-5, B-6, C-1, C-2, E-1, E-2, F-1 and F-2, including all improvements thereon and appurtenances thereunto belonging, full fee simple title:

2. As to Parcels A-1, A-4, B-4, B-7, B-8, B-9, E-3, E-4, E-5, and T-1, including all improvements thereon and appurtenances thereunto belonging, fee simple title, subject, however, to the following:

#### Parcels A-1 and A-4

(a) Perpetual access easement (to and from Exclusion 1 as delineated on Exhibit "D") of the City and County of Honolulu acquired by deed dated July 25, 1932, recorded in Liber 1174, page 82 of the Bureau of Conveyances of the Territory of Hawaii; said access easement being by way of Parcel A-4 and along the right of way described in Exhibit "C" and delineated on Exhibit "D", both attached hereto, as Easement No. 1, and reserving to the said City and County of Honolulu the right to permit the operation, maintenance and repair of public utility facilities over, under and along said access easement, said [295] access easement to be used in common with the Government and its permittees.

#### Parcel A-1

(b) Perpetual easement of the City and County of Honolulu, acquired by deed dated July 25, 1932, recorded in Liber 1174, Page 82 of the Bureau of Conveyances of the Territory of Hawaii, for the

operation, maintenance and repair of a pipe line, together with the right of ingress and egress for such purposes, the centerline of which is described in Exhibit "C" and delineated on Exhibit "D" attached hereto, as Easement 2.

Parcels B-4, B-8 and B-9

(c) The existing right of the Hawaiian Electric Company, Limited, its successors and assigns, to operate, maintain, and repair electric power transmission poles and wire lines, together with the right of egress and ingress for such purposes, over the rights of way, the centerlines of which are described in Exhibit "C" and delineated on Exhibit "D", attached hereto, as Easements 3-A, 3-B and 3-F; said right having been acquired by the said Hawaiian Electric Company, Limited, from the Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, by instrument dated July 31, 1944, and recorded in Liber 1852, pages 19 and 29, in the Bureau of Conveyances of the Territory of Hawaii.

(d) The right hereby reserved unto,

(1) George Miles Collins, John Kirkwood Clarke, Frank Elbert Midkiff, Edwin Pauhaulani Murray, and Joseph Boyd Poindexter, as Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, and to their successors in trust and assigns, as to Parcel B-9; and [296]

(2) A. Lester Marks, Elizabeth Loy Marks, and Elizabeth Janet Cartwright McCandless, as Trustees under the Will and of the Estate of L. L.

McCandless, Deceased, and to their successors in trust and assigns, as to Parcels E-3, E-4, and E-5; and to

(3) The City and County of Honolulu, a municipal corporation of the Territory of Hawaii, and its assigns, as to Parcel T-1, to operate, maintain, and repair, electric power transmission poles and wire lines, together with the rights of way, the centerlines of which are described in Exhibit "C" and delineated on Exhibit "D", attached hereto, as Easement 3-C, for so long only as the said rights of way over which said facilities pass are used for such purposes.

(e) The right hereby reserved to the present fee owners, their successors, assigns, and permittees, to use Parcel B-7 as a roadway in common, however, with the United States of America and its permittees."

Petitioner states that it is necessary that the Petition herein be amended to more accurately define the estate being taken.

Dated Honolulu, T. H., this 17th day of September, 1945.

UNITED STATES  
OF AMERICA,

By /s/ CHARLES F. RATHBUN,  
Special Asst. to the Atty. Gen.

[Printer's Note]: Parcels A-1 to B-9 of Exhibit "C" are the same as A-1 to B-9 set out at pages 115-154 of this printed record, with exception of last paragraph of Parcel B-9 which reads as follows: "Subject to Easement 3-F and portion of Easement 3-C, said easements being delineated on the aforesaid drawing."

Parcels C-1, C-2, E-1 and E-2 are the same as C-1, C-2, E-1 and E-2 set out at pages 155-160, with exception of last paragraph of E-1 and E-2 being deleted.

Parcel E-3 same as E-3 set out at page 160 except last paragraph refers to Easement 3-C instead of 3-E.

Parcels E-4 and E-5 are the same as E-4 and E-5 set out at pages 161-2 with following paragraph added: "Subject to a portion of Easement 3-C hereinafter described, said Easement being delineated on the aforesaid drawing."

Parcel F-1 same as F-1 set out at page 165 with the exception of last paragraph being deleted.

Parcel F-2 same as F-2 set out at page 166.

Parcel T-1 same as T-1 set out at page 168 with following added: "Subject to a portion of Easement 3-C hereinafter described, said Easement being delineated on the aforesaid drawing."

Easements 1-2-3A and 3B same as 1-2-3A and 3-B set out at pages 168-171.

## EASEMENT 3-C

Description of Centerline of Electric Transmission Line for Hawaiian Electric Co., Ltd.

Being easements twenty-two (22) feet wide, running over and across Parcels T-1, E-5, B-9, E-3 and E-4 of the U. S. Navy Acquisition under Civil Suit No. 529, same being portions of Territorial Government land of Kalanihale, Grant 159 to J. Lovell, R. P. 6240, L. C. Aw. 7723, Apana 2 to Hopee, R. P. 4475, L. C. Aw. 7713, Apana 46 to V. Kama-malu, R. P. 208, L. C. Aw. 9377, Apana 1 to Lio, R. P. 209, L. C. Aw. 9320, Apana 2 to Keoho and R. P. 223, L. C. Aw. 9373 to Kamoku.

Situated at Manana-Iki and Waiawa, Ewa, Oahu.

## Part 1

Beginning at the Easterly end of this center line, at a point on the East boundary of the U. S. Navy Acquisition under Civil Suit No. 529 and on the Westerly end of Second St., the coordinates of said point of beginning referred to Government Survey Triangulation Station "Ewa Church" being 131.26 feet South and 2438.51 feet East and thence running by azimuths measured clockwise from True South:

1.  $113^{\circ} 01'$ —141.14 feet;
2.  $112^{\circ} 00'$ —322.00 feet parallel to and twenty-two (22) feet Southwest of the proposed center line of Second St. Extension;

3.  $112^{\circ} 00'$ —845.24 feet parallel to and twenty-two (22) feet Southwest of the proposed center line of Second St. Extension;
4.  $112^{\circ} 00'$ —519.94 feet parallel to and twenty-two (22) feet Southwest of the proposed center line of Second St. Extension; [359]
5.  $179^{\circ} 28'$ —494.69 feet;
6.  $113^{\circ} 08'$ —41.46 feet to the West boundary of the U. S. Navy Acquisition and the East bank of Waiawa Stream, said point being 1066.83 feet North and 701.55 feet East of Government Survey Triangulation Station "Ewa Church".

### Part 2

Beginning at the end of Course 1 of Part 1 above described and running therefrom:

1.  $273^{\circ} 55'$ —146.48 feet to the East boundary of the U. S. Navy Acquisition and the Westerly end of Second St.

### Part 3

Beginning at the end of Course 2 of Part 1 above described and running therefrom:

1.  $187^{\circ} 02'$ —65.00 feet.

### Part 4

Beginning at the end of Course 3 of Part 1 above described and running therefrom:

1.  $48^{\circ} 13'$ —217.09 feet to the South boundary of the U. S. Navy Acquisition and the North bank of Waiawa Stream, said point being 216.54 feet

North and 1064.48 feet East of Government Survey Triangulation Station "Ewa Church"

Together with an additional easement for guy purposes on three areas, circular in shape, one circle each centering on the end of Courses 1, 4 and 5 of Part 1 above described and having a radius of fifteen (15) feet, thirty (30) feet and forty (40) feet, respectively; save and except any portions of said circular areas which conflict with the proposed extension of Second St. of which do not lie within the U. S. Navy Acquisition, and as delineated on the 14th Naval District Drawing No. OA-N1-939.

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[Title of District Court and Cause No. 529.]

ORDER AMENDING PETITION  
IN CONDEMNATION

Now this 17th day of September, 1945, upon motion by the Petitioner, United States of America, by its Attorney, Charles F. Rathbun, Special Assistant to the Attorney General, it appearing that it is necessary to more accurately define the estate being taken in the land described herein,

It Is Ordered:

That the Petition in Condemnation be amended by striking Exhibits "A" and "B" attached to said Petition and substituting therefore Exhibits "C" and "D" attached to the Motion this day filed herein, asking for an Order Amending the Petition herein, and by striking from said Petition in the

1st, 2nd, 3rd, and 4th lines from the bottom of page 1 the following words:

“more particularly described in Exhibit “A” hereto annexed and made a part hereof as though set forth at length and shown upon the map marked Exhibit “B”, also attached hereto.” [362]

and substituting for said words after the words “certain land” in the 4th line from the bottom thereof,

“more particularly described in Exhibit “C” hereto annexed and made a part hereof as though set forth at length and shown upon the map marked Exhibit “D”, also attached hereto.”

and by striking all of Paragraph III of said Petition in Condemnation and substituting therefore a new Paragraph III as set forth in the said motion this day filed herein asking for an Order Amending Petition in Condemnation herein.

Dated Honolulu, T. H., this 17th day of September, 1945.

(Seal)        /s/ D. E. METZGER,  
Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed Sept. 17, 1945.

[363]

In the District Court of the United States  
for the District of Hawaii

April Term 1945

Civil No. 529

UNITED STATES OF AMERICA,

Petitioner,

vs.

344.893 Acres of land, more or less, at Manana and  
Waiawa, Ewa, Oahu, T. H.; Oahu Railway and  
Land Company, an Hawaiian corporation; et al.;  
Defendants.

## ORDER AND JUDGMENT ON DECLARATION OF TAKING

It appearing that on the 7th day of September, 1944, the United States of America filed a Petition for Condemnation of certain lands described and shown in said Petition; and

It further appearing that the said Petition for Condemnation has been amended pursuant to an Order of the Court this day entered herein; and

It further appearing that there was filed herein on the 17th day of September, 1945, in the above cause, a Declaration of Taking signed by James Forrestal, Secretary of the Navy, under and pursuant to the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421) and under the further authority of the Act of Congress

approved March 27, 1942 (Public Law 507, 77th Congress), the Act of Congress approved April 28, 1942 (Public Law 528, 77th Congress) and the Act of Congress approved June 26, 1943 (Public Law 92, 78th Congress) declaring taken the estates and interests as set forth in said Declaration of taking and as shown on Exhibits "A" and "B" attached to said Declaration of Taking: that the uses of said lands are those described in the said Declaration of Taking and in the petition filed herein as amended; and that the said Declaration of Taking sets forth the estimate of just compensation made pursuant to law and that contemporaneously with the filing of said Declaration of Taking there was deposited [364] in the registry of this Court, for the use and benefit of the persons entitled thereto the sum of One Hundred Forty-three Thousand Two Hundred Four Dollars and Fifteen Cents (\$143,204.15).

It Is Ordered, Adjudged and Decreed that by virtue of the filing of said Declaration of Taking and the deposit of said money, title to the estates and interests in said lands thus shown on Schedules "A" and "B" attached to said Declaration of Taking be and the same is hereby indefeasibly vested in the United States of America to the following extent and with the following reservations:

1. As to Parcels A-2, A-3, A-5, A-6, A-7, A-8, A-9, A-10, B-1, B-2, B-3, B-5, B-6, C-1, C-2, E-1, E-2, F-1 and F-2, including all improvements thereon and appurtenances thereunto belonging, full fee simple title:

2. As to Parcels A-1, A-4, B-4, B-7, B-8, B-9, E-3, E-4, E-5, and T-1, including all improvements thereon and appurtenances thereunto belonging, fee simple title, subject, however, to the following:

Parcels A-1 and A-4

(a) Perpetual access easement (to and from Exclusion 1 as delineated on Exhibit "B") of the City and County of Honolulu acquired by deed dated July 25, 1932, recorded in Liber 1174, page 82 of the Bureau of Conveyances of the Territory of Hawaii; said access easement being by way of Parcel A-4 and along the right of way described in Exhibit "A" and delineated on Exhibit "B" both attached hereto, as Easement No. 1, and reserving to the said City and County of Honolulu the right to permit the operation, maintenance and repair of public utility facilities over, under and along said access easement, said access easement to be used in common with the Government and its permittees. [365]

Parcel A-1

(b) Perpetual easement of the City and County of Honolulu, acquired by deed dated July 25, 1932, recorded in Liber 1174, page 82 of the Bureau of Conveyances of the Territory of Hawaii, for the operation, maintenance, and repair of a pipe line, together with the right of ingress and egress for such purposes, the centerline of which is described in Exhibit "A" and delineated on Exhibit "B" attached hereto, as Easement 2.

## Parcels B-4, B-8 and B-9

(c) The existing right of the Hawaiian Electric Company, Limited, its successors and assigns, to operate, maintain, and repair electric power transmission poles and wire lines, together with the right of ingress and egress for such purposes, over the rights of way, the centerlines of which are described in Exhibit "A" and delineated on Exhibit "B" attached hereto, as Easements 3-A, 3-B and 3-F; said right having been acquired by the said Hawaiian Electric Company, Limited, from the Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, by instrument dated July 31, 1944, and recorded in Liber 1852, pages 19 and 29, in the Bureau of Conveyances of the Territory of Hawaii.

(d) The right hereby reserved unto,

(1) George Miles Collins, John Kirkwood Clarke, Frank Elbert Midkiff, Edwin Pauhaulani Murray and Joseph Boyd Poindexter, as Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, and to their successors in trust and assigns, as to Parcel B-9; and [366]

(2) A. Lester Marks, Elizabeth Loy Marks, and Elizabeth Janet Cartwright McCandless, as Trustees under the Will and of the Estate of L. L. McCandless, Deceased, and to their successors in trust and assigns, as to Parcels E-3, E-4 and E-5; and to

(3) The City and County of Honolulu, a municipal corporation of the Territory of Hawaii, and

its assigns, as to Parcel T-1, to operate, maintain and repair, electric power transmission poles and wire lines, together with the rights of way, the centerlines of which are described in Exhibit "A" and delineated on Exhibit "B", attached hereto, as Easement 3-C, for so long only as the said rights of way over which said facilities pass are used for such purposes.

(d) The right hereby reserved to the present fee owners, their successors, assigns, and permittees, to use Parcel B-7 as a roadway in common, however, with the United States of America and its permittees."

It Is Further Ordered that a copy of this Order be promptly served by the United States Marshal upon each of the defendants in this cause having an interest in this proceeding, and the Marshal is further ordered to post a copy hereof in a conspicuous place on the premises and to forthwith make due return of his said service to this Court.

Dated Honolulu, T. H., this 17th day of September, 1945.

(Seal)            /s/ D. E. METZGER,

Judge of the United States District Court for the  
District of Hawaii.

[367]

In the District Court of the United States  
For the District of Hawaii

April Term 1944

Civil No. 532

UNITED STATES OF AMERICA,

Petitioner,

vs.

8.279 ACRES OF LAND, more or less, at Halawa.  
Oahu, Territory of Hawaii; Charles M. Hite,  
Trustee under the Will and of the Estate of  
Emma Kaleleonalani, Honolulu Plantation Com-  
pany, an Hawaiian corporation, et al.,  
Defendants.

### PETITION FOR CONDEMNATION

To the Honorable, the Presiding Judges of the  
United States District Court for the District of  
Hawaii:

Now comes the United States of America, by  
Robert S. Tarnay, Special Assistant to the Attor-  
ney General, acting under the instructions of the  
Attorney General of the United States and at the  
request of the Secretary of Navy and respectfully  
represents to the Court:

#### I.

That this proceeding is instituted under the auth-  
ority of divers and sundry acts of Congress among  
them the following:

The Act of Congress approved March 27.  
1942 (Public Law 507—77th Congress)

The Act of Congress approved June 26, 1943  
(Public Law 92—78th Congress)

and that the Secretary of Navy, acting under authority vested in him by law has determined that it is necessary that the United States of America acquire by condemnation by judicial process certain land, more particularly described in Exhibit "A" hereto annexed and made a part hereof as though set forth at length and shown upon the map marked Exhibit "B", also attached hereto. [369]

## II.

That the lands sought to be condemned are located adjoining Aliamanu Crater, Halawa, Oahu Territory of Hawaii, and lie wholly within the jurisdiction of this Court.

## III.

That the interest sought to be condemned in this action is the fee simple title, and all improvements thereon and appurtenances thereunto belonging, subject to existing public utility, pipeline, and irrigation and drainage easements, if any, and said land is for use in connection with the erection of tanks for expansion of water storage facilities for the Navy Yard and the entire military area adjacent to Pearl Harbor.

## IV.

That Charles M. Hite, Trustee under the Will and of the Estate of Emma Kaleleonalani; Honolulu Plantation Company, an Hawaiian corporation; City and County of Honolulu; Territory of Hawaii and all other persons, companies or corporations, either known or unknown, who claim to

have or own any right, title or interest of any character whatever in said land are made defendants herein.

## V.

That the Secretary of Navy of the United States has determined that the utmost haste in expediting this project is vital to the War purposes of the United States and that he has, therefore, determined that possession of said lands and all improvements thereon and appurtenances thereunto belonging, to the extent or interest to be acquired therein, is necessary by the United States and that certain and adequate provisions have been made for the payment of just compensation which may be adjudged due for the condemnation of the land described and shown on Exhibits "A" and "B".

That the Petitioner has been in possession of said lands from and since May 15, 1944.

Wherefore, your Petitioner prays this Honorable Court to take jurisdiction of this cause and enter all orders, judgments and decrees necessary to determine title of said real estate condemned, or any part [370] thereof, and to fix and determine that the continued possession of the lands identified in Paragraph V is necessary for the War and Naval purposes of the United States: that upon payment into the registry of this Court for the use of the persons entitled thereunto of the sum adjudged to be full compensation for the condemnation of said land, that title to said land be vested in the United States of America, in fee simple, subject to the exceptions set forth in Paragraph

III, and that the Court make distribution of the final awards among the persons entitled thereto as expeditiously as may be and for such other and further relief as to the Court may seem just and proper in the premises.

UNITED STATES  
OF AMERICA,

By CHARLES F. RATHBUN,  
Special Asst to the Atty Gen.

By /s/ ROBERT S. TARNAY,  
Special Asst to the Atty Gen.

(Duly Verified.)

[371]

EXHIBIT A

PARCEL 1

Being a portion of Lot 1-A of Land Court Application 966 Situated about 5,000 feet Easterly from Kamehameha Highway and about 4,000 feet Southerly from Moanalua Road at Halawa, Ewa, Oahu, T. H.

Beginning at a U.S.M.R. Monument at the South corner of this piece of land and on the Northwest-erly boundary of Exclusion 7 of Land Court Application 966, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 1,170.23 feet South and 4,865.35 feet West, and running by true azimuths measured clockwise from South:

1. 132° 46'—464.30 feet to a pipe;

2.  $221^{\circ} 20'$ —472.50 feet to a pipe;
  3.  $193^{\circ} 32'$ —316.65 feet to a pipe;
  4.  $297^{\circ} 37' 30''$ —489.55 feet to a pipe;
  5.  $2^{\circ} 20'$ —50.75 feet;
  6.  $28^{\circ} 25'$ —98.26 feet along Exclusion 7 of Land Court Application 966;
  7.  $40^{\circ} 36'$ —305.55 feet along Exclusion 7 of Land Court Application 966;
  8.  $31^{\circ} 13'$ —446.45 feet along Exclusion 7 of Land Court Application 966 to the point of beginning;
- Containing an area of 8.279 acres.

/s/ JAMES B. MANN,

Registered Professional Surveyor Certificate Number 75.

Honolulu, Hawaii. July 26, 1944.

[Endorsed]: Filed Sept. 16, 1944.

[372]

In the District Court of the United States  
For the District of Hawaii

April Term 1944

Civil No. 533

UNITED STATES OF AMERICA,

Petitioner,

vs.

218.349 ACRES OF LAND, more or less, at Waiawa Gulch, Waiawa, Oahu, Territory of Hawaii; George Miles Collins, John Kirkwood Clarke, Frank Elbert Midkiff, Edwin Pauhaulani Murray and Joseph Boyd Poindexter Trustees under the Will and of the Estate of Bernice P. Bishop, et al.,

Defendants.

### PETITION FOR CONDEMNATION

To the Honorable, the Presiding Judges of the United States District Court for the District of Hawaii:

Now comes the United States of America, by Robert S. Tarnay, Special Assistant to the Attorney General, acting under the instructions of the Attorney General of the United States and at the request of the Secretary of Navy and respectfully represents to the Court:

#### I.

That this proceeding is instituted under the authority of divers and sundry Acts of Congress, among them the following:

The Act of Congress approved March 27, 1942 (Public Law 507—77th Congress)

The Act of Congress approved August 6, 1942 (Public Law 700—77th Congress)

and that the Secretary of Navy, acting under authority vested in him by law has determined that it is necessary that the United States of America acquire by condemnation by judicial process certain lands, more particularly described in Exhibit "A" hereto annexed and made a part hereof as though set forth at length and shown upon the map marked Exhibit "B", also attached hereto.

## II.

That the lands sought to be condemned are located at Waiawa Gulch, Waiawa, Oahu, Territory of Hawaii, and lie wholly within the jurisdiction of this Court. [375]

## III.

That the interest sought to be condemned in this section is the full fee simple title, including all improvements thereon and appurtenances thereunto belonging, to Parcels one and two and a perpetual easement for a 100' roadway, described and shown on Exhibits "A" and "B", said land to be used for aviation storage facilities in connection with the Aviation Supply Depot.

## IV.

That George Miles Collins, John Kirkwood Clarke, Frank Elbert Midkiff, Edwin Pauhaulani Murray and Joseph Boyd Poindexter, Trustees under the Will and of the Estate of Bernice P

Bishop; Libby, McNeill & Libby, a Maine corporation; Oahu Sugar Company, an Hawaiian corporation; Honolulu Plantation Company, a California corporation; Oahu Railway & Land Company, an Hawaiian corporation; Hawaiian Electric Company, an Hawaiian corporation; City and County of Honolulu; Territory of Hawaii and all other persons, companies or corporations, either known or unknown, who claim to have or own any right, title or interest of any character whatever in said land are made defendants herein.

V.

That the Secretary of Navy of the United States has determined that the utmost haste in expediting this project is vital to the War purposes of the United States and that he has, therefore, determined that possession of said lands and all improvements thereon and appurtenances thereunto belonging, to the extent or interest to be acquired therein, is necessary by the United States and that certain and adequate provisions have been made for the payment of just compensation which may be adjudged due for the condemnation of the land described and shown on Exhibits "A" and "B".

That the Petitioner has been in possession of said lands from and since January 11, 1943, pursuant to right of entry.

Wherefore, your Petitioner prays this Honorable Court to take jurisdiction of this cause and enter all orders, judgments and decrees necessary to determine title of said real estate condemned, or any part thereof, and to fix and determine that

the continued possession of the lands identified in Paragraph V is necessary for the War and Naval purposes of the United States; that upon payment into the registry of this Court for the use [376] of the persons entitled thereunto of the sum adjudged to be full compensation for the condemnation of said land, that title to Parcels one and two be vested in the United States of America, in fee simple, and that said Petitioner have a perpetual easement for the 100' roadway described and shown on Exhibits "A" and "B".

UNITED STATES

OF AMERICA,

By CHARLES F. RATHBUN,

Special Asst. to the Atty. Gen.

By /s/ ROBERT S. TARNAY,

Special Asst. to the Atty. Gen.

(Duly Verified.)

[377]

EXHIBIT "A"

PARCEL 1

Being a portion of R. P. 4475, L. C. Aw. 7713, Apana 46 to V. Kamamalu Situated at Waiawa, Ewa, Oahu, T. H.

Beginning at an iron pin on the Northerly boundary of this piece of land, the true azimuth and distance from a  $1\frac{1}{4}$ " pipe called "Flag" being  $24^{\circ} 58' 157.70$  feet, the coordinates of said  $1\frac{1}{4}$ " pipe referred to Government Survey Triangulation Station "Ewa Church" being 7,176.56 feet North and

802.93 feet East, and running by true azimuths measured clockwise from South:

1.  $229^{\circ} 40'$ —309.80 feet to an iron pin;
2.  $242^{\circ} 54'$ —190.90 feet to an iron pin;
3.  $247^{\circ} 57'$ —207.40 feet to an iron pin;
4.  $249^{\circ} 59'$ —264.30 feet to an iron pin;
5.  $265^{\circ} 16'$ —148.80 feet to an iron pin;
6.  $249^{\circ} 54'$ —255.80 feet to an iron pin;
7.  $246^{\circ} 39'$ —183.00 feet to an iron pin;
8.  $238^{\circ} 37'$ —217.80 feet to an iron pin;
9.  $238^{\circ} 20'$ —395.80 feet to an iron pin, the azimuth and distance from a  $1\frac{1}{2}$ " pipe called "Red" being  $321^{\circ} 41' 59.70$  feet;
10.  $221^{\circ} 17'$ —563.20 feet to an iron pin;
11.  $239^{\circ} 44'$ —198.20 feet to an iron pin;
12.  $214^{\circ} 04'$ —371.30 feet to an iron pin;
13.  $195^{\circ} 52'$ —105.50 feet to an iron pin;
14.  $197^{\circ} 06'$ —114.00 feet to an iron pin;
15.  $184^{\circ} 15'$ —839.30 feet to an iron pin;
16.  $237^{\circ} 45'$ —771.00 feet to an iron pin;
17.  $269^{\circ} 51'$ —321.10 feet to an iron pin;
18.  $312^{\circ} 34'$ —298.20 feet to an iron pin;
19.  $320^{\circ} 04'$ —527.50 feet to an iron pin;
20.  $3^{\circ} 18'$ —269.50 feet to an iron pin; [378]
21.  $9^{\circ} 17'$ —394.10 feet to an iron pin;
22.  $4^{\circ} 16'$ —1381.60 feet to an iron pin;
23.  $60^{\circ} 18'$ —115.00 feet to an iron pin;
24.  $105^{\circ} 06'$ —138.70 feet to an iron pin, the azimuth and distance from a  $1\frac{1}{2}$ " pipe called "Cane 2" being  $100^{\circ} 32' 79.65$  feet;
25.  $100^{\circ} 49'$ —517.90 feet to an iron pin;
26.  $86^{\circ} 04'$ —298.80 feet to an iron pin;

27.  $61^{\circ} 30'$ —163.40 feet to an iron pin;
28.  $56^{\circ} 51'$ —250.30 feet to an iron pin, the azimuth and distance from a  $1\frac{1}{2}"$  pipe called "Slope" being  $30^{\circ} 00'$  98.60 feet;
29.  $43^{\circ} 53'$ —471.10 feet to an iron pin;
30.  $37^{\circ} 08'$ —330.60 feet to an iron pin;
31.  $56^{\circ} 59'$ —612.10 feet to an iron pin;
32.  $72^{\circ} 30'$ —234.80 feet to an iron pin;
33.  $61^{\circ} 48'$ —289.50 feet to an iron pin;
34.  $43^{\circ} 52'$ —95.90 feet to an iron pin;
35.  $29^{\circ} 27'$ —79.00 feet to an iron pin, the azimuth and distance from a  $1\frac{1}{2}"$  pipe called "Bluff" being  $23^{\circ} 55'$  180.00 feet;
36.  $18^{\circ} 58'$ —216.40 feet to an iron pin;
37.  $41^{\circ} 45'$ —168.90 feet to an iron pin;
38.  $43^{\circ} 42'$ —162.10 feet to an iron pin;
39.  $25^{\circ} 03'$ —202.70 feet to an iron pin;
40.  $11^{\circ} 58'$ —171.80 feet to an iron pin;
41.  $6^{\circ} 23'$ —499.90 feet to an iron pin;
42.  $19^{\circ} 18'$ —200.80 feet to an iron pin;
43.  $30^{\circ} 49'$ —136.60 feet to an iron pin;
44.  $46^{\circ} 52'$ —116.30 feet to an iron pin;
45.  $57^{\circ} 18'$ —292.70 feet to an iron pin;
46.  $65^{\circ} 46'$ —150.80 feet to an iron pin;
47.  $83^{\circ} 44'$ —98.50 feet to an iron pin; [379]
48.  $172^{\circ} 00'$ —230.00 feet to an iron pin;
49.  $120^{\circ} 00'$ —200.00 feet to an iron pin;
50.  $171^{\circ} 00'$ —55.10 feet to a "+" cut on rock;
51.  $64^{\circ} 31'$ —78.70 feet to an iron pin;
52.  $154^{\circ} 31'$ —100.00 feet along the end of a 100-foot roadway to an iron pin;
53.  $244^{\circ} 31'$ —190.00 feet to an iron pin;

54.  $176^{\circ} 34'$ —784.10 feet along Parcel 2 to an iron pin;
55.  $124^{\circ} 17'$ —260.30 feet to an iron pin;
56.  $192^{\circ} 19'$ —211.20 feet to an iron pin;
57.  $175^{\circ} 38'$ —163.00 feet to an iron pin;
58.  $209^{\circ} 44'$ —379.90 feet to an iron pin;
59.  $194^{\circ} 10'$ —307.30 feet to an iron pin;
60.  $207^{\circ} 50'$ —350.50 feet to the point of beginning; Containing an area of 210.098 acres, and as delineated on 14th Naval District Drawing No. OA-N1-649.

/s/ JAMES B. MANN,

Registered Professional Surveyor Certificate Number 75.

Honolulu, Hawaii. May 13, 1943.

[380]

## PARCEL 2

Being a portion of R. P. 4475, L. C. Aw. 7713, Apana 46 to V. Kamamalu Situated on the Southwesterly side of Parcel 1 at Waiawa, Ewa, Oahu. T. H.

Beginning at an iron pin at the Southeast corner of this piece of land and on the Southwesterly boundary of Parcel 1, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Ewa Church" being 4,797.63 feet North and 538.50 feet East, and running by true azimuths measured clockwise from South:

1.  $64^{\circ} 31'$ —59.85 feet along Parcel 1 to an iron pin;

2.  $177^{\circ} 36'$ —253.70 feet to an iron pin;
3.  $138^{\circ} 13'$ —141.40 feet to an iron pin;
4.  $143^{\circ} 26'$ —23.65 feet to an iron pin;
5.  $228^{\circ} 14'$ —193.20 feet to an iron pin;
6.  $356^{\circ} 34'$ —481.70 feet along Parcel 1 to the point of beginning;

Containing an area of 0.811 acre, and as delineated on 14th Naval District Drawing No. OA-N1-649.

/s/ JAMES B. MANN,

Registered Professional Surveyor Certificate Number 75.

Honolulu, Hawaii, June 25, 1943.

[381]

### 100-FOOT ROADWAY

Being a portion of R. P. 4475, L. C. Aw. 7713. Apana 46 to V. Kamamalu Situated on the Northeasterly side of the Waiawa Cut-off Road at Waiawa, Ewa, Oahu, T. H.

Beginning at the Southwest corner of this piece of land and on the Northeasterly side of the Waiawa Cut-off Road, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Ewa Church" being 2,274.69 feet North and 1,153.29 feet West, and running by true azimuths measured clockwise from South:

Along the Northeasterly side of the Waiawa Cut-off Road on a curve to the left with a radius of 1,472.40 feet, the azimuth and distance of the chord being:

1.  $101^{\circ} 05'$ —324.85 feet;

Thence on a curve to the left with a radius of 50.00 feet, the azimuth and distance of the chord being:

2.  $214^{\circ} 52' 30''$ —86.49 feet;

3.  $155^{\circ} 00'$ —39.00 feet;

Thence on a curve to the right with a radius of 550.00 feet, the azimuth and distance of the chord being:

4.  $183^{\circ} 50'$ —530.49 feet;

5.  $212^{\circ} 40'$ —1244.38 feet;

Thence on a curve to the right with a radius of 1,030.00 feet, the azimuth and distance of the chord being:

6.  $228^{\circ} 35' 30''$ —565.22 feet;

7.  $244^{\circ} 31'$ —747.80 feet to an iron pin;

8.  $334^{\circ} 31'$ —100.00 feet along Parcel 2 to an iron pin;

9.  $64^{\circ} 31'$ —747.80 feet;

Thence on a curve to the left with a radius of 930.00 feet, the azimuth and distance of the chord being: [382]

10.  $48^{\circ} 35' 30''$ —510.34 feet;

11.  $32^{\circ} 40'$ —1244.38 feet;

Thence on a curve to the left with a radius of 450.00 feet, the azimuth and distance of the chord being;

12.  $3^{\circ} 50'$ —434.04 feet;

13.  $335^{\circ} 00'$ —74.75 feet;

Thence on a curve to the left with a radius of 269.52 feet, the azimuth and distance of the chord being;

14.  $311^{\circ} 12' 30''$ —217.46 feet to the point of beginning;

Containing an area of 7.440 acres, and as delineated on 14th Naval District Drawing No. OA-N1-649.

Subject to Pole-Line Easement, hereinafter described, said easement being delineated on the aforesaid drawing.

/s/ JAMES B. MANN,

Registered Professional Surveyor Certificate Number 75.

Honolulu, Hawaii, May 13, 1943.

[383]

## POLE LINE EASEMENT

### Over and Across a 100-foot Roadway

Being a portion of R. P. 4475, L. C. Aw. 7713, Apana 46 to V. Kamamalu Situated at Waiawa, Ewa, Oahu, T. H.

Being a strip of land, 50.00 feet wide, extending 25.00 feet on each side of the following described center line:

Beginning at the Southeasterly end of the center line of this easement and on the Easterly side of the 100-foot roadway, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Ewa Church" being 2,474.43 feet North and 1,343.22 feet West, and running by true azimuth measured clockwise from South:

1. 127° 00'—173.83 feet to the Westerly side of a 100-foot roadway.

/s/ JAMES B. MANN,

Registered Professional Surveyor Certificate Number 75.

Honolulu, Hawaii, June 8, 1943.

[Endorsed]: Filed Sept. 21, 1944.

[384]

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[Title of District Court and Cause No. 533.]

### DECLARATION OF TAKING

Whereas, pursuant to the authority of the Acts of Congress approved March 27, 1942 (Public Law 507, 77th Congress), and August 6, 1942 (Public Law 700, 77th Congress) the above styled condemnation proceeding has been instituted.

Now, Therefore, pursuant to the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), I, Secretary of the Navy, do hereby make and cause to be filed this declaration of taking, and by virtue of authority thereof do hereby state that the lands selected for acquisition aggregate 218.349 acres, more or less, at Waiawa Gulch, Waiawa, Oahu, Territory of Hawaii, more particularly described in Exhibit "A" attached hereto and made a part hereof, and delineated on a map entitled "Aviation Supply Depot—Boundary Survey", designated as 14th N. D. Dwg. No. OA-N1-649, dated 6 May 1943, revised 13 May 1943, attached hereto as Exhibit "B" and made a part hereof. [386]

And I do declare said lands to be taken under the authority of the aforesaid acts of Congress; that the use to which said lands are to be put is for aviation storage facilities in connection with the Aviation Supply Depot, and for other Naval purposes, as authorized by said acts.

And I do further declare that the estate to be condemned in this action is as follows:

1. As to Parcels 1 and 2, including all improvements thereon and appurtenances thereunto belonging, full fee simple title;

2. As to Parcel 3, including all improvements thereon and appurtenances thereunto belonging, fee simple title, subject, however, to the following:

(a) The existing rights of the Hawaiian Electric Company, Limited, its successors and assigns, to operate, maintain, and repair, electric power transmission poles and wire lines, over and across said parcel; said rights having been acquired by the said Hawaiian Electric Company, Limited, from the Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, by instruments dated September 23, 1943 and July 31, 1944, recorded in the Bureau of Conveyances of the Territory of Hawaii in Liber 1846, at pages 244-251, and in Liber 1852, at pages 10-20.

(b) The right hereby reserved to the present fee owners, their successors, assigns, and permittees, to use said Parcel 3 as a roadway in common, however, with the United States of America, and its permittees.

And I, Secretary of the Navy, do hereby state

that the sum of money estimated by me to be just compensation for said lands and all improvements thereon and appurtenances thereunto belonging, is Eighteen Thousand Seven Hundred Seventy-Nine Dollars (\$18,779.00), which sum is hereby deposited into the registry of the court for the use and benefit of the persons entitled thereto. [387]

The ostensible owner of the property is the Bernice P. Bishop Estate.

I am of the opinion that the ultimate award for the taking of said lands will be within the limits prescribed by Congress.

In Witness Whereof, the petitioner, by and through the Secretary of the Navy, has caused this declaration of taking to be signed in the City of Washington, District of Columbia, this 24th day of July, 1945.

UNITED STATES  
OF AMERICA,

By /s/ JAMES FORRESTAL. [388]

EXHIBIT "A"

PARCEL 1

Being a portion of R. P. 4475, L. C. Aw. 7713 Apana 46 to V. Kamamalu Situated at Waiawa. Ewa, Oahu, T. H.

Beginning at an iron pin on the Northerly boundary of this piece of land, the true azimuth and distance from a 1¼" pipe called "Flag" being 24° 58' 157.70 feet, the coordinates of said 1¼" pipe

referred to Government Survey Triangulation Station "Ewa Church" being 7,176.56 feet North and 802.93 feet East, and running by true azimuths measured clockwise from South:

1.  $229^{\circ} 40'$ —309.80 feet to an iron pin;
2.  $242^{\circ} 54'$ —190.90 feet to an iron pin;
3.  $247^{\circ} 57'$ —207.40 feet to an iron pin;
4.  $249^{\circ} 59'$ —264.30 feet to an iron pin;
5.  $265^{\circ} 16'$ —148.80 feet to an iron pin;
6.  $249^{\circ} 54'$ —255.80 feet to an iron pin;
7.  $246^{\circ} 39'$ —183.00 feet to an iron pin;
8.  $238^{\circ} 37'$ —217.80 feet to an iron pin;
9.  $238^{\circ} 20'$ —395.80 feet to an iron pin, the azimuth and distance from a  $1\frac{1}{2}"$  pipe called "Red" being  $321^{\circ} 41' 59.70$  feet;
10.  $221^{\circ} 17'$ —563.20 feet to an iron pin;
11.  $239^{\circ} 44'$ —198.20 feet to an iron pin;
12.  $214^{\circ} 04'$ —371.30 feet to an iron pin;
13.  $195^{\circ} 52'$ —105.50 feet to an iron pin;
14.  $197^{\circ} 06''$ —114.00 feet to an iron pin;
15.  $184^{\circ} 15'$ —839.30 feet to an iron pin;
16.  $237^{\circ} 45'$ —771.00 feet to an iron pin;
17.  $269^{\circ} 51'$ —321.10 feet to an iron pin;
18.  $312^{\circ} 34'$ —298.20 feet to an iron pin;
19.  $320^{\circ} 04'$ —527.50 feet to an iron pin;
20.  $3^{\circ} 18'$ —269.50 feet to an iron pin: [389]
21.  $9^{\circ} 17'$ —394.10 feet to an iron pin;
22.  $4^{\circ} 16'$ —1381.60 feet to an iron pin;
23.  $60^{\circ} 18'$ —115.00 feet to an iron pin;
24.  $105^{\circ} 06'$ —138.70 feet to an iron pin, the azimuth and distance from a  $1\frac{1}{2}"$  pipe called "Cane 2" being  $100^{\circ} 32' 79.65$  feet;

25.  $100^{\circ} 49'$ —517.90 feet to an iron pin;
26.  $86^{\circ} 04'$ —298.80 feet to an iron pin;
27.  $61^{\circ} 30'$ —163.40 feet to an iron pin;
28.  $56^{\circ} 51'$ —250.30 feet to an iron pin, the azimuth and distance from a  $1\frac{1}{2}"$  pipe called "Slope" being  $30^{\circ} 00'$  98.60 feet;
29.  $43^{\circ} 53'$ —471.10 feet to an iron pin;
30.  $37^{\circ} 08'$ —330.60 feet to an iron pin;
31.  $56^{\circ} 59'$ —612.10 feet to an iron pin;
32.  $72^{\circ} 30'$ —234.80 feet to an iron pin;
33.  $61^{\circ} 48'$ —289.50 feet to an iron pin;
34.  $43^{\circ} 52'$ —95.90 feet to an iron pin;
35.  $29^{\circ} 27'$ —79.00 feet to an iron pin, the azimuth and distance from a  $1\frac{1}{2}"$  pipe called "Bluff" being  $23^{\circ} 55'$  180.00 feet;
36.  $18^{\circ} 58'$ —216.40 feet to an iron pin;
37.  $41^{\circ} 45'$ —168.90 feet to an iron pin;
38.  $43^{\circ} 42'$ —162.10 feet to an iron pin;
39.  $25^{\circ} 03'$ —202.70 feet to an iron pin;
40.  $11^{\circ} 58'$ —171.80 feet to an iron pin;
41.  $6^{\circ} 23'$ —499.90 feet to an iron pin;
42.  $19^{\circ} 18'$ —200.80 feet to an iron pin;
43.  $30^{\circ} 49'$ —136.60 feet to an iron pin;
44.  $46^{\circ} 52'$ —116.30 feet to an iron pin;
45.  $57^{\circ} 18'$ —292.70 feet to an iron pin;
46.  $65^{\circ} 46'$ —150.80 feet to an iron pin;
47.  $83^{\circ} 44'$ —98.50 feet to an iron pin: [390]
48.  $172^{\circ} 00'$ —230.00 feet to an iron pin;
49.  $120^{\circ} 00'$ —200.00 feet to an iron pin;
50.  $171^{\circ} 00'$ —55.10 feet to a "+" cut on rock;
51.  $64^{\circ} 31'$ —78.70 feet to an iron pin;
52.  $154^{\circ} 31'$ —100.00 feet along the end of a 100-foot roadway to an iron pin;

53.  $244^{\circ} 31'$ —190.00 feet to an iron pin;
54.  $176^{\circ} 34'$ —784.10 feet along Parcel 2 to an iron pin;
55.  $124^{\circ} 17'$ —260.30 feet to an iron pin;
56.  $192^{\circ} 19'$ —211.20 feet to an iron pin;
57.  $175^{\circ} 38'$ —163.00 feet to an iron pin;
58.  $209^{\circ} 44'$ —379.90 feet to an iron pin;
59.  $194^{\circ} 10'$ —307.30 feet to an iron pin;
60.  $207^{\circ} 50'$ —350.50 feet to the point of beginning;  
Containing an area of 210.098 acres, and as delineated on 14th Naval District Drawing No. OA-N1-649.

/s/ JAMES B. MANN,

Registered Professional Surveyor Certificate Number 75.

Honolulu, Hawaii, May 13, 1943.

[391]

## PARCEL 2

Being a portion of R. P. 4475, L. C. Aw. 7713, Apana 46 to V. Kamamalu Situated on the Southwesterly side of Parcel 1 at Waiawa, Ewa, Oahu T. H.

Beginning at an iron pin at the Southeast corner of this piece of land and on the Southwesterly boundary of Parcel 1, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Ewa Church" being 4,797.65 feet North and 538.50 feet East, and running by true azimuths measured clockwise from South:

1.  $64^{\circ} 31'$ —59.85 feet along Parcel 1 to an iron pin;

2.  $177^{\circ} 36'$ —253.70 feet to an iron pin;
3.  $138^{\circ} 13'$ —141.40 feet to an iron pin;
4.  $143^{\circ} 26'$ —23.65 feet to an iron pin;
5.  $228^{\circ} 14'$ —193.20 feet to an iron pin;
6.  $356^{\circ} 34'$ —481.70 feet along Parcel 1 to the point of beginning;

Containing an area of 0.811 acre, and as delineated on 14th Naval District Drawing No. OA-N1-649.

/s/ JAMES B. MANN,

Registered Professional Surveyor Certificate Number 75.

Honolulu, Hawaii, June 25, 1943.

[392]

### PARCEL 3

Being a portion of R. P. 4475, L. C. Aw. 7713, Apana 46 to V. Kamamalu, situated on the Northeasterly side of the Waiawa Cut-off Road at Waiawa, Ewa, Oahu, T. H.

Beginning at the Southwest corner of this piece of land and on the Northeasterly side of the Waiawa Cut-off Road, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Ewa Church" being 2,274.69 feet North and 1,153.29 feet West, and running by true azimuths measured clockwise from South:

Along the Northeasterly side of the Waiawa Cut-off Road on a curve to the left with a radius of 1,472.40 feet, the azimuth and distance of the chord being:

1.  $101^{\circ} 05'$ —324.85 feet;  
Thence on a curve to the left with a radius of 50.00 feet, the azimuth and distance of the chord being:
2.  $214^{\circ} 52' 30''$ —86.49 feet;
3.  $155^{\circ} 00'$ —39.00 feet;  
Thence on a curve to the left with a radius of 550.00 feet, the azimuth and distance of the chord being:
4.  $183^{\circ} 50'$ —530.49 feet;
5.  $212^{\circ} 40'$ —1244.38 feet;  
Thence on a curve to the right with a radius of 1,030.00 feet, the azimuth and distance of the chord being:
6.  $228^{\circ} 35' 30''$ —565.22 feet;
7.  $244^{\circ} 31'$ —747.80 feet to an iron pin;
8.  $334^{\circ} 31'$ —100.00 feet along Parcel 2 to an iron pin;
9.  $64^{\circ} 31'$ —747.80 feet;  
Thence on a curve to the left with a radius of 930 feet, the azimuth and distance of the chord being: [393]
10.  $48^{\circ} 35' 30''$ —510.34 feet;
11.  $32^{\circ} 40'$ —1244.38 feet;  
Thence on a curve to the left with a radius of 450.00 feet, the azimuth and distance of the chord being:
12.  $3^{\circ} 50'$ —434.04 feet;
13.  $335^{\circ} 00'$ —74.75 feet;  
Thence on a curve to the left with a radius of 269.52 feet the azimuth and distance of the chord being:

14. 311° 12' 30"—217.46 feet to the point of beginning; Containing an area of 7.440 acres, and as delineated on 14th Naval District Drawing No. OA-N1-649.

/s/ JAMES B. MANN,

Registered Professional Surveyor, Certificate Number 75.

Honolulu, Hawaii, May 13, 1943.

[Endorsed]: Filed Aug. 13, 1945. [394]

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[Title of District Court and Cause No. 533.]

MOTION FOR ORDER AMENDING  
PETITION

Now comes the Petitioner, United States of America, by its attorney, Charles F. Rathbun, Special Assistant to the Attorney General, and moves that this Court enter an order amending the Petition in Condemnation heretofore filed in this cause by striking all of Paragraph III of said Petition in Condemnation and substituting therefore a new Paragraph III as follows:

“That the estate sought to be condemned in this action is as follows:

1. As to Parcels 1 and 2, including all improvements thereon and appurtenances thereunto belonging, full fee simple title;
2. As to Parcel 3, the said Parcel 3 being the 100' roadway described and shown on Exhibits “A” and “B” attached to the Petition in Condemnation

herein, including all improvements thereon and appurtenances thereunto belonging, fee simple title, subject, however, to the following: [396]

(a) The existing rights of the Hawaiian Electric Company, Limited, its successors and assigns, to operate, maintain, and repair, electric power transmission poles and wire lines, over and across said parcel; said rights having been acquired by the said Hawaiian Electric Company, Limited, from the Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, by instruments dated September 23, 1943 and July 31, 1944, recorded in the Bureau of Conveyances of the Territory of Hawaii in Liber 1846, at pages 244-251, and in Liber 1852, at pages 10-20.

(b) The right hereby reserved to the present fee owners, their successors, assigns, and permittees, to use said Parcel 3 as a roadway in common, however, with the United States of America, and its permittees."

Petitioner states that it is necessary that the petition herein be amended to more accurately define the estate being taken.

Dated Honolulu, T. H., this 13th day of August, 1945.

UNITED STATES OF  
AMERICA,

By /s/ CHARLES F. RATHBUN,  
Special Assistant to the  
Attorney General.

[Endorsed]: Filed Aug. 13, 1945. [397]

[Title of District Court and Cause No. 533.]

### ORDER AMENDING PETITION

Now this 13th day of August, 1945, upon motion by the Petitioner, United States of America, by its attorney, Charles F. Rathbun, Special Assistant to the Attorney General, it appearing that it is necessary to more accurately define the estate being taken in the land described and shown on Exhibits "A" and "B" attached to the Petition in Condemnation filed herein,

It is ordered:

That the Petition in Condemnation be amended by striking all of Paragraph III of said Petition in Condemnation and substituting therefore a new Paragraph III as follows:

"That the estate sought to be condemned in this action is as follows:

1. As to Parcels 1 and 2, including all improvements thereon and appurtenance thereunto belonging, full fee simple title.

2. As to Parcel 3, the said Parcel 3 being the 100' roadway described and shown on Exhibits "A" and "B" attached to the Petition in Condemnation herein, including all improvements thereon and appurtenances thereunto belonging, fee simple title, subject, however, to the following: [398]

(a) The existing rights of the Hawaiian Electric Company, Limited, its successors and assigns, to operate, maintain, and repair, electric power transmission poles and wire lines, over and across

said parcel; said rights having been acquired by the said Hawaiian Electric Company, Limited, from the Trustees under the Will and of the Estate of Bernice P. Bishop, deceased, by instruments dated September 23, 1943 and July 31, 1944, recorded in the Bureau of Conveyances of the Territory of Hawaii in Liber 1846, at pages 244-251, and in Liber 1852, at pages 10-20.

(b) The right hereby reserved to the present fee owners, their successors, assigns, and permittees, to use said Parcel 3 as a roadway in common, however, with the United States of America, and its permittees."

Dated: Honolulu, T. H., this 13th day of August, 1945.

/s/ J. FRANK McLAUGHLIN,  
Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed Aug. 13, 1945. [399]

In the District Court of the United States  
for the District of Hawaii

April Term 1945

Civil No. 533

UNITED STATES OF AMERICA,

Petitioner,

v.

218.349 ACRES OF LAND, more or less, at Wai-  
awa Gulch, Waiawa, Oahu, Territory of Hawaii;  
George Miles Collins, John Kirkwood Clarke,  
Frank Elbert Midkiff, Edwin Pauhaulani Mur-  
ray and Joseph Boyd Poindexter, Trustees  
under the Will and of the Estate of Bernice  
P. Bishop, et al.,

Defendants.

## ORDER AND JUDGMENT ON DECLARATION OF TAKING

It appearing that on September 21, 1944, the United States of America, filed a Petition for condemnation of certain land described and shown on Exhibits "A" and "B" attached to the Declaration of Taking filed herein; and

It further appearing that said Declaration of Taking was filed in the above cause on the 13th day of August, 1945, said Declaration of Taking being signed by James Forrestal, Secretary of the Navy, under and pursuant to provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), declaring taken the full fee simple title to Parcels 1 and 2, including all improvements thereon

and appurtenances thereunto belonging, and declaring taken the full fee simple title as to Parcel 3, which said Parcel 3 is the 100' roadway described and shown on Exhibits "A" and "B" attached to the Petition in Condemnation herein, including all improvements thereon and appurtenances thereunto belonging, subject, however, to certain rights more fully set forth in said Declaration of Taking; that the uses of said land are those described in the Declaration of Taking and in the Petition filed [400] herein; and that the said Declaration of Taking sets forth the estimate of just compensation made pursuant to law and that contemporaneously with the filing of said Declaration of Taking, there was deposited in the Registry of this Court for the use and benefit of the persons entitled thereto the sum of Eighteen Thousand Seven Hundred Seventy-Nine Dollars (\$18,779.00),

It is ordered, adjudged and decreed that by virtue of the filing of said Declaration of Taking and the deposit of said money, full fee simple title to the land described and shown on Exhibits "A" and "B", attached to the said Declaration of Taking, together with all improvements thereon and appurtenances thereunto belonging, be and it is hereby indefeasibly vested in the United States of America, subject to the rights recited in said Declaration of Taking in favor of Hawaiian Electric Company, Limited and to the present fee owners, their successors, assigns and permittees as to Parcel 3.

It is further ordered that a copy of this Order be promptly served by the United States Marshal

upon each of the defendants in this cause. The Marshal is further ordered to post a copy hereof in a conspicuous place on the premises and to forthwith make due return of his said service to this Court.

Dated: Honolulu, T. H., this 13th day of August, 1945.

J. FRANK McLAUGHLIN,  
Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed Aug. 13, 1945. [401]

In the District Court of the United States for the  
District of Hawaii

October Term 1944

Civil No. 535

UNITED STATES OF AMERICA,

Petitioner,

vs.

145.848 acres of land, more or less situate at Halawa and Aiea, Ewa, Island of Oahu, Territory of Hawaii; GEORGE MILES COLLINS, JOHN KIRKWOOD CLARKE, FRANK ELBERT MIDKIFF, EDWIN PAUHAULANI MURRAY and JOSEPH BOYD POINDEXTER, Trustees under the Will and of the Estate of BERNICE P. BISHOP; HONOLULU PLANTATION COMPANY, a California corporation; HAWAIIAN ELECTRIC COMPANY, LTD., an Hawaiian corporation; A. LESTER MARKS, Executor of the Estate of L. L. McCandless; BISHOP TRUST COMPANY, LTD., Administrator with the Will Annexed of the Estate of L. L. McCandless; A. LESTER MARKS, ELIZABETH LOY MARKS, and ELIZABETH JANET CARTWRIGHT McCANDLESS, Trustees under the Will and of the Estate of L. L. McCandless; HAWAIIAN TRUST COMPANY, an Hawaiian corporation; MANUEL COSTA, JR.; CITY AND COUNTY OF HONOLULU; TERRITORY OF HAWAII; and all other persons, companies or corporations, either known or unknown, who claim to have or own any right, title or interest of any character whatever in said land:  
Defendants.

### PETITION FOR CONDEMNATION

To the Honorable, the Presiding Judges of the  
United States District Court for the District of  
Hawaii:

Now comes the United States of America, by  
Robert S. Tarnay, Special Assistant to the Attor-

ney General, acting under the instructions of the Attorney General of the United States and at the request of the Secretary of Navy and respectfully represents to the Court: [402]

## I.

That this proceeding is instituted under the authority of divers and Sundry Acts of Congress, among them the following:

The Act of Congress approved March 27, 1942 (Public Law 507—77th Congress)

The Act of Congress approved August 6, 1942 (Public Law 700—77th Congress)

The Act of Congress approved June 26, 1943 (Public Law 92—78th Congress)

The Act of Congress approved January 28, 1944 (Public Law 224—78th Congress)

and that the Secretary of Navy, acting under authority vested in him by law has determined that it is necessary that the United States of America acquire by condemnation, by judicial process, certain lands, more particularly described in Exhibits "A1", "A2" and "A3", hereto annexed and made parts hereof as though set forth at length and shown upon maps marked Exhibits "B1", "B2" and "B3", also attached hereto.

## II.

That the lands sought to be condemned are located at Halawa and Aiea, Island of Oahu, Territory of Hawaii, and lie wholly within the jurisdiction of this Court.

## III.

That the estate to be condemned in this action is the fee simple title, subject to all existing public utility, pipe line, irrigation, drainage and railroad easements, and subject to the right of the public to use the boundary roads of the area, if any, said land to be used in connection with the Aiea Naval Barracks.

## IV.

That George Miles Collins, John Kirkwood Clarke, Frank Elbert Midkiff, Edwin Pauhaulani Murray and Joseph Boyd Poindexter, Trustees under the Will and of the Estate of Bernice P. Bishop; Honolulu Plantation Company, a California corporation; Hawaiian Electric Company, Ltd., an Hawaiian corporation; A. Lester Marks, Executor of the Estate of L. L. McCandless; Bishop Trust Company, Ltd., Administrator [403] with the Will Annexed of the Estate of L. L. McCandless; A. Lester Marks, Elizabeth Loy Marks, and Elizabeth Janet Cartwright McCandless, Trustees under the Will and Estate of L. L. McCandless; Hawaiian Trust Company, an Hawaiian corporation; Manuel Costa, Jr.; City and County of Honolulu; Territory of Hawaii and all other persons, companies or corporations, either known or unknown, who claim to have or own any right, title or interest of any character whatever in said lands are made defendants herein.

## V.

That the Secretary of Navy of the United States has determined that the utmost haste in expediting

this project is vital to the War purposes of the United States and that he has, therefore, determined that possession of said lands, to the extent of the interest to be acquired therein, is necessary by the United States and that certain and adequate provisions have been made for the payment of just compensation which may be adjudged due for the condemnation of the land described and shown on Exhibits "A1", "A2" and "A3" and "B1", "B2" and "B3".

That the land described and shown on Exhibits "A1" and "B1" is presently under lease to the petitioner, covering approximately 100 acres.

That the petitioner has been in possession of 26.195 acres, described and shown on Exhibits "A3" and "B3" as "Second Additional Area", from and since January 5, 1944 pursuant to right of entry.

That the petitioner has been in possession of 15.076 acres, described and shown on Exhibits "A2" and "B2", from and since March 1, 1944.

That the petitioner has been in possession of 1.716 acres, described and shown on Exhibits "A3" and "B3" as a portion of "Third Additional Area", from and since August 21, 1944.

That the petitioner has been in possession of 2.732 acres, described and shown on Exhibits "A3" and "B3" as a portion of [404] "Third Additional Area", from and since August 29, 1944.

Wherefore, your Petitioner prays this Honorable Court to take jurisdiction of this cause and enter all orders, judgments and decrees necessary to determine title of said real estate condemned,

or any part thereof, and to fix and determine that the continued possession of the lands identified in Paragraph V is necessary for the War and Naval purposes of the United States; that upon payment into the registry of this Court for the use of the persons entitled thereunto of the sum adjudged to be full compensation for the condemnation of said land, that title to said land be vested in the United States of America, in fee simple, subject to the exceptions set forth in Paragraph III, and that the Court make distribution of the final awards among the persons entitled thereto as expeditiously as may be and for such other and further relief as to the Court may seem just and proper in the premises.

UNITED STATES OF  
AMERICA,

By /s/ CHARLES F. RATHBUN,  
Special Assistant to the  
Attorney General,

By /s/ ROBERT S. TARNAY,  
Special Assistant to the  
Attorney General.

(Duly Verified.) [405]

**EXHIBIT A-1****DESCRIPTIONS OF PORTIONS A, B, AND C,  
LAND SITUATED AT HALAWA,  
EWA, OAHU, T. H.**

Revised October 11, 1943

To Conform to the Widening of Kamehameha  
Highway

**PORTION A**

Estate of L. L. McCandless—Owner

Land situated near the Southeast side of Kamehameha Highway approximately 300 feet East of Halawa Bridge at Halawa, Ewa, Oahu, T. H.

Being the Whole of Royal Patent 457, Land Commission Award 2131, Apana 1 to Kanihoalii for Kaukiwaa.

Beginning at the Southwest corner of this parcel of land, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 763.60 feet North and 9583.20 feet West, and running by azimuths measured clockwise from true South:

1.  $164^{\circ} 00'$ —124.00 feet along L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui;
2.  $155^{\circ} 00'$ —186.00 feet along L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui;
3.  $234^{\circ} 00'$ —83.00 feet along L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui;
4.  $338^{\circ} 15'$ —319.00 feet along L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui;

## Exhibit A-1—(Continued)

5.  $61^{\circ} 00'$ —83.00 feet along L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to the point of beginning and containing an area of 0.545 acres, and as delineated on 14th Naval District Drawing No. OA-N1-490. [407]

## PORTION B

Trustees of B. P. Bishop Estate—Owners

Land situated on the Southeast side of Kamehameha Highway and on the southerly side of new highway to Aiea Naval Hospital and on the Southwest side of Moanalua Road at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land Commission Award 7712 at 8516-B to M. Kekuanaoa and Kamaikui.

Beginning at a pipe at the North corner of this parcel of land, at the South corner of the new highway to Aiea Naval Hospital and Moanalua Road, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3780.28 feet North and 6221.95 feet West, and running by azimuths measured clockwise from true South:

1.  $305^{\circ} 27'$ —53.56 feet along the Southwest side of Moanalua Road to a pipe. Thence along the Southwest side of Moanalua Road, on a curve to the left, with a radius of 1007.00 feet, the direct azimuth and distance being:

## Exhibit A-1—(Continued)

2. 294° 03' 09"—398.00 feet to a pipe;
3. 25° 53'—151.85 feet along the remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
4. 59° 25'—54.00 feet along remainder of L. C. Aw. 7712 [408] and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
5. 63° 59'—244.60 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
6. 69° 59'—169.60 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
7. 86° 26' 30"—188.50 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
8. 97° 48'—112.80 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
9. 78° 52'—197.40 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
10. 79° 49'—188.00 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
11. 66° 23'—99.50 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
12. 82° 43'—115.80 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;

## Exhibit A-1—(Continued)

13. 75° 40'—201.10 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
14. 62° 17'—186.20 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
15. 76° 08'—117.50 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
16. 79° 06' 30"—110.90 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
17. 69° 09'—77.50 feet along remainder of L. C. Aw. 7712 [409] and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
18. 39° 42'—98.10 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
19. 5° 03' 30"—176.20 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
20. 13° 31'—174.60 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
21. 58° 35'—27.50 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
22. 94° 12'—243.30 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
23. 55° 19'—189.90 feet along remainder of L. C.

## Exhibit A-1—(Continued)

- Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
24. 45° 00'—167.10 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
25. 19° 47'—122.55 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
26. 3° 16' 30"—54.65 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
27. 325° 54'—116.65 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
28. 298° 50'—149.50 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
29. 299° 31'—166.55 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
30. 351° 36'—71.95 feet along remainder of L. C. Aw. 7712 [410] and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
31. 14° 29'—77.40 feet along remainder of L. C. Aw. 7712 and 8516-B to a pipe;
32. 28° 13'—90.85 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
33. 48° 35'—288.20 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;

## Exhibit A-1—(Continued)

34. 53° 06'—131.25 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
35. 39° 11'—90.05 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
36. 59° 42'—36.10 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
37. 89° 41'—160.10 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
38. 32° 32'—139.60 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
39. 46° 50' 30"—188.70 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
40. 34° 14' 30"—72.35 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
41. 12° 13'—248.80 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
42. 18° 31'—43.05 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
43. 62° 42' 30"—53.50 feet along remainder of L. C. Aw. 7712 [411] and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;

## Exhibit A-1—(Continued)

44.  $114^{\circ} 00'$ —65.15 feet along L. C. Aw. 1983 to Hapule to a pipe;
45.  $355^{\circ} 00'$ —41.70 feet along L. C. Aw. 1983 to Hapule to a pipe;
46.  $84^{\circ} 43'$ —51.10 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
47.  $101^{\circ} 16'$ —110.10 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
48.  $96^{\circ} 05'$ —124.70 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
49.  $81^{\circ} 30'$ —80.00 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
50.  $350^{\circ} 30'$ —197.25 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
51.  $66^{\circ} 55'$ —54.53 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to the middle of Halawa Stream. Thence following down along Halawa Stream along Parcel 4-C of the Makalapa Lands for the next two (2) courses, the direct azimuths and distances between points in middle of said stream being:
52.  $153^{\circ} 26'$ —25.00 feet;
53.  $123^{\circ} 50'$ —325.29 feet to the Southeast side of Kamehameha Highway;

## Exhibit A-1—(Continued)

54.  $203^{\circ} 32'$ —116.70 feet along the Southeast side of Kamehameha Highway;
55.  $293^{\circ} 32'$ —15.00 feet along the Southeast side of Kamehameha Highway; [412]
56.  $203^{\circ} 32'$ —710.19 feet along the Southeast side of Kamehameha Highway. Thence along the Southeast side of Kamehameha Highway, on a curve to the right, with a radius of 5679.65 feet, the direct azimuth and distance being:
57.  $204^{\circ} 25' 57''$ —178.26 feet;
58.  $115^{\circ} 19' 54''$ —15.00 feet along the Southeast side of Kamehameha Highway. Thence along the Southeast side of Kamehameha Highway on a curve to the right, with a radius of 5694.65 feet, the direct azimuth and distance being:
59.  $207^{\circ} 13' 42''$ —376.95 feet;
60.  $209^{\circ} 07' 30''$ —1204.14 feet along the Southeast side of Kamehameha Highway. Thence along the Southeast side of the new highway to Aiea Naval Hospital, on a curve to the right, with a radius of 400.00 feet, the direct azimuth and distance being:
61.  $225^{\circ} 41' 45''$ —228.16 feet;
62.  $242^{\circ} 16'$ —392.61 feet along the Southeast side of the new highway to Aiea Naval Hospital. Thence along the Southeast side of the new highway to Aiea Naval Hospital, on a curve to the right, with a radius of 2834.79 feet, the direct azimuth and distance being:
63.  $249^{\circ} 06' 55''$ —676.08 feet;
64.  $345^{\circ} 57' 50''$ —5.00 feet along the Southerly

## Exhibit A-1—(Continued)

side of the new highway to Aiea Naval Hospital. Thence along the Southerly side of the new highway to Aiea Naval [413] Hospital, on a curve to the right, with a radius of 2829.79 feet, the direct azimuth and distance being:

65.  $258^{\circ} 22' 10''$ —237.55 feet;
66.  $260^{\circ} 46' 30''$ —121.50 feet along the Southerly side of the new highway to Aiea Naval Hospital;
67.  $170^{\circ} 46' 30''$ —5.00 feet along the Southerly side of the new highway to Aiea Naval Hospital;
68.  $260^{\circ} 46' 30''$ —1050.32 feet along the Southerly side of new highway to Aiea Naval Hospital to the point of beginning and containing a gross area of 75.091 acres and a net area of 74.546 acres, after excluding and deducting Portion A described as follows: (and as designated on 14th Naval District Drawing No. OA-N1-490).

## PORTION A

Estate of L. L. McCandless—Owner

Land situated near the Southeast side of Kamehameha Highway approximately 300 feet East of Halawa Bridge at Halawa, Ewa, Oahu, T. H.

Being the Whole of Royal Patent 457, Land Commission Award 2131, Apana 1 to Kanihoalii for Kaukiwaa.

Beginning at the Southwest corner of this parcel of land, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 763.60 feet North and 9583.20 feet

## Exhibit A-1—(Continued)

West, and running by azimuths measured clockwise from true South:

1. 164° 00'—124.00 feet along L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui; [414]
2. 155° 00'—186.00 feet along L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui;
3. 234° 00'—83.00 feet along L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui;
4. 338° 15'—319.00 feet along L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui;
5. 61° 00'—83.00 feet along L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to the point of beginning and containing an area of 0.545 aere, and as delineated on 14th Naval District Drawing No. OA-N1-490.

Portion B is subject to the following easements, said easements being delineated on aforesaid drawing.

## EASEMENTS 1-A and 1-B

The Hawaiian Electric Co., Ltd.'s Easement for Transmission Line Fifty (50) Feet Wide

Land situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekuanaoa and Kamaikui.

## Centerline Description of Easement 1-A.

Beginning on the Southeasterly boundary of Portion B, and on the centerline of the Hawaiian Electric Co., Ltd.'s easement, the coordinates of which

## Exhibit A-1—(Continued)

referred to Government Survey Triangulation Station "Salt Lake" being 1731.59 feet North and 8216.66 feet West, and running by azimuth measured clockwise from true South:

1.  $173^{\circ} 52' 30''$ —142.96 feet. [415]

## Centerline Description of Easement 1-B.

Beginning on the Southeasterly boundary of Portion B, and on the centerline of the Hawaiian Electric Co., Ltd.'s easement, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 2461.06 feet North and 8294.92 feet West, and running by azimuth measured clockwise from true South:

1.  $173^{\circ} 52' 30''$ —776.24 feet to the Southeasterly side of the new highway to Aiea Naval Hospital.

## EASEMENT 3-B

Honolulu Plantation Co.'s Easement for Railroad  
Sixteen (16) Feet Wide

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekua-naoa and Kamaikui.

## Centerline Description.

Beginning on the Northerly boundary of Portion B, and on the Southerly side of the new highway to Aiea Naval Hospital, the coordinates of which referred to Government Survey Triangulation Sta-

## Exhibit A-1—(Continued)

tion "Salt Lake" being 3543.45 feet North and 7594.97 feet West, and running by azimuths measured clockwise from true South:

On a curve to the right, with a [416] radius of 520.10 feet, the direct azimuth and distance being:

1. 289° 31' 02"—108.42 feet;
2. 295° 30'—232.11 feet.

Thence on a curve to the right, with a radius of 1302.50 feet, the direct azimuth and distance being:

3. 303° 57' 16"—383.00 feet to the Southerly boundary of Portion B.

## EASEMENT 4-B

The United States of America Perpetual Easement Five (5) Feet Wide Dated May 28, 1940, Recorded in Liber 1581, Page 385, in the Bureau of Conveyances at Honolulu.

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekuaaoa and Kamaikui.

## Centerline Description.

Beginning on the Northerly boundary of Portion B, and on the Southerly boundary of the new highway to Aiea Naval Hospital, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3542.14 feet North

## Exhibit A-1—(Continued)

and 7600.39 feet West, and running by azimuths measured clockwise from true South:

1.  $281^{\circ} 16'$ —30.32 feet;
2.  $291^{\circ} 21'$ —99.37 feet; [417]
3.  $296^{\circ} 02'$ —247.82 feet;
4.  $301^{\circ} 27'$ —154.82 feet;
5.  $396^{\circ} 27'$ —133.94 feet;
6.  $313^{\circ} 34'$ —56.76 feet to the Southerly boundary of Portion B.

## EASEMENT 5-B

Honolulu Plantation Co.'s Easement for Ditch  
Six (6) Feet Wide

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekua-naoa and Kamaikui.

## Centerline Description.

Beginning on the Southerly boundary of Portion B, and on the centerline of the Honolulu Plantation Co.'s easement for ditch six (6) feet wide, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3045.51 feet North and 7462.46 feet West, and running by azimuths clockwise from true South:

1.  $200^{\circ} 20'$ —42.25 feet;
2.  $187^{\circ} 22'$ —11.85 feet;
3.  $183^{\circ} 31'$ —363.90 feet;
4.  $225^{\circ} 54'$ —207.00 feet to the Southerly side of the new highway to Aiea Naval Hospital. [418]

## Exhibit A-1—(Continued)

## EASEMENT 6

Honolulu Plantation Co.'s Easement for Ditch  
Six (6) Feet Wide

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekuanaoa and Kamaikui.

## Centerline Description.

Beginning on the Southerly boundary of Portion B, and on the centerline of the Honolulu Plantation Co.'s easement for ditch six (6) feet wide, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3248.77 feet North and 6448.58 feet West, and running by azimuths measured clockwise from true South:

1.  $246^{\circ} 23'$ —16.95 feet;
2.  $255^{\circ} 31'$ —38.45 feet;
3.  $175^{\circ} 10'$ —479.00 feet;
4.  $260^{\circ} 46' 30''$ —214.30 feet;
5.  $305^{\circ} 27'$ —55.27 feet;
6.  $302^{\circ} 30'$ —140.00 feet;
7.  $298^{\circ} 00'$ —105.00 feet;
8.  $290^{\circ} 26' 30''$ —110.30 feet;
9.  $263^{\circ} 00'$ —10.00 feet;
10.  $208^{\circ} 30'$ —14.00 feet to the Southerly side of Moanalua Road. [419]

## Exhibit A-1—(Continued)

## EASEMENT 7-B

Mutual Telephone Co.'s Easement for Telephone  
Line Ten (10) Feet Wide

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekua-naoa and Kamaikui.

## Centerline Description.

Beginning on the Southerly boundary of Portion B, and on the centerline of the Mutual Telephone Co.'s easement for telephone line ten (10) feet wide, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3251.74 feet North and 6400.77 feet West, and running by azimuth measured clockwise from true South:

1.  $177^{\circ} 07'$ —496.08 feet to the Southerly side of the new highway to Aiea Naval Hospital.

## EASEMENT 8-A

Hawaiian Electric Co., Ltd.'s Easement for Trans-  
mission Line Ten (10) Feet Wide

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekua-naoa and Kamaikui. [420]

## Centerline Description.

Beginning on the Northeasterly boundary of Por-

## Exhibit A-1—(Continued)

tion B, and on the Southwest side of Moanalua Road, on the centerline of the Hawaiian Electric Co., Ltd.'s easement for transmission line ten (10) feet wide, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3723.31 feet North and 6140.09 feet West, and running by azimuths measured clockwise from true South:

1.  $304^{\circ} 25' 30''$ —352.94 feet;
2.  $320^{\circ} 31'$ —3.36 feet to the Southerly boundary of Portion B.

## EASEMENT 8-B

Hawaiian Electric Co., Ltd.'s Easement for Transmission Line Ten (10) Feet Wide

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekua-naoa and Kamaikui. [421]

## Centerline Description.

Beginning on the centerline of Easement 8-A, above described, and on the centerline of the Hawaiian Electric Co., Ltd.'s easement for transmission line ten (10) feet wide, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3634.25 feet North and 6010.14 feet West, and running by azimuth measured clockwise from true South:

1.  $323^{\circ} 39' 15''$ —221.83 feet to the Southerly boundary of Portion B.

## Exhibit A-1—(Continued)

## EASEMENT 9-B

Honolulu Plantation Co.'s Easement for Electric  
Transmission Line Ten (10) Feet Wide

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land  
Commission Award 7712 and 8516-B to M. Kek-  
uanaoa and Kamaikui.

## Centerline Description.

Beginning on the Southerly boundary of Portion  
B, and on the centerline of the Honolulu Planta-  
tion Co.'s easement for electric transmission line  
ten (10) feet wide, the coordinates of which re-  
ferred to Government Survey Triangulation Sta-  
tion "Salt Lake" being 3234.67 feet North and  
6741.45 feet West, and running by azimuth meas-  
ured clockwise from true South:

1.  $137^{\circ} 55'$ —541.99 feet to the Southerly side of  
the new highway to Aiea Naval Hospital. [422]

## PORTION C

Trustees of B. P. Bishop Estate—Owners

Land Situated on the Northerly side of new high-  
way to Aiea Naval Hospital between Kamehameha  
Highway and Moanalua Road at Halawa, Ewa,  
Oahu, T. H.

Being a Portion of Royal Patent 6717, Land  
Commission Award 7712 and 8516-B to M. Kek-  
uanaoa and Kamaikui.

## Exhibit A-1—(Continued)

Beginning at U.S.M.R. Monument No. 14 at the North corner of this parcel of land, on the boundary of the lands of Aiea and Halawa, and on the Southwest side of Moanalua Road, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 4485.44 feet North and 7212.38 feet West, and running by azimuths measured clockwise from true South:

1.  $305^{\circ} 27'$ —1130.47 feet to a pipe;
2.  $80^{\circ} 46' 30''$ —989.64 feet along the Northwest side of the new highway to Aiea Naval Hospital;
3.  $170^{\circ} 46' 30''$ —5.00 feet along the Northwest side of the new highway to Aiea Naval Hospital;
4.  $80^{\circ} 46' 30''$ —121.70 feet along the Northwest side of the new highway to Aiea Naval Hospital. Thence along the Northwest side of the new highway to Aiea Naval Hospital, on a curve to the left, with a radius of 2899.79 feet, the direct azimuth and distance being:
5.  $78^{\circ} 22' 10''$ —243.42 feet; [423]
6.  $345^{\circ} 57' 50''$ —5.00 feet along the Northerly side of the new highway to Aiea Naval Hospital. Thence along the Northwest side of the new highway to Aiea Naval Hospital, on a curve to the left, with a radius of 2894.79 feet, the direct azimuth and distance being:
7.  $74^{\circ} 00' 15''$ —197.99 feet. Thence along the Northwest side of the new highway to Aiea Naval Hospital, on a curve to the left, with a

## Exhibit A-1—(Continued)

radius of 2894.79 feet, the direct azimuth and distance being:

8.  $67^{\circ} 09' 20''$ —493.41 feet;
9.  $62^{\circ} 16'$ —318.93 feet along the Northwest side of the new highway to Aiea Naval Hospital. Thence along the Northeasterly corner of Kamehameha Highway and the new highway to Aiea Naval Hospital, on a curve to the right, with a radius of 30.00 feet, the direct azimuth and distance being:
10.  $118^{\circ} 55'$ —50.12 feet;
11.  $209^{\circ} 07' 30''$ —279.96 feet along the Southeast side of Kamehameha Highway. Thence along the Southeast side of Kamehameha Highway, on a curve to the left, with a radius of 1120.48 feet, the direct azimuth and distance being:
12.  $203^{\circ} 11' 54''$ —231.39 feet;
13.  $287^{\circ} 16' 18''$ —15.00 feet along the Southeast-erly side of Kamehameha Highway. Thence along the Southeast side of Kamehameha Highway, on a curve to the left, with a radius of 1135.48 feet, the direct azimuth and distance being: [424]
14.  $194^{\circ} 45' 27''$ —99.62 feet;
15.  $237^{\circ} 48' 20''$ —1321.31 feet along the land of Aiea to the point of beginning and containing an area of 25.038 acres, and as delineated on the 14th Naval District Drawing No. OA-N1-490.

Subject to the following easements, said easements being delineated on aforesaid drawing.

Exhibit A-1—(Continued)

EASEMENT 1-C

The Hawaiian Electric Co., Ltd.'s Easement for  
Transmission Line Fifty (50) Feet Wide

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land  
Commission Award 7712 and 8516-B to M. Kek-  
uanaoa and Kamaikui.

Centerline Description.

Beginning on the Southerly boundary of Portion  
C, and on the Northerly side of the new highway  
to Aiea Naval Hospital, and on the centerline of  
the Hawaiian Electric Co., Ltd.'s easement for  
transmission line fifty (50) feet wide, the coordi-  
nates of which referred to Government Survey  
Triangulation Station "Salt Lake" being 3297.04  
feet North and 8384.62 feet West, and running by  
azimuth measured clockwise from true South:

1. 173° 52' 30"—276.63 feet to the Easterly side  
of Kamehameha Highway. [425]

EASEMENT 2

Oahu Railway and Land Co.'s and Honolulu Plan-  
tation Co.'s Easement for Railroad Sixteen  
(16) Feet Wide

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land  
Commission Award 7712 and 8516-B to M. Kek-  
uanaoa and Kamaikui.

## Exhibit A-1—(Continued)

## Centerline Descriptions.

Beginning on the Westerly boundary of Portion C, and at the Easterly corner of the new highway to Aiea Naval Hospital and Kamehameha Highway, and on the centerline of the Oahu Railway and Land Co.'s and Honolulu Plantation Co.'s easement for railroad sixteen (16) feet wide, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3206.39 feet North and 8577.60 feet West, and running by azimuths measured clockwise from true South:

1.  $242^{\circ} 20'$ —452.63 feet. Thence on a curve to the left, with a radius of 722.79 feet, the direct azimuth and distance being:
2.  $218^{\circ} 18' 30''$ —588.55 feet;
3.  $194^{\circ} 17'$ —282.18 feet to the Halawa-Aiea boundary, being also the Northwest boundary of Portion C. [426]

## Centerline Description of Siding.

Beginning on the centerline of the above described easement, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3778.39 feet North and 7845.28 feet West, and running by azimuths measured clockwise from true South:

On a curve to the left, with a radius of 161.40 feet, the direct azimuth and distance being:

1.  $209^{\circ} 04' 50''$ —64.29 feet.

Thence on a curve to the left, with a radius

## Exhibit A-1—(Continued)

of 733.56 feet, the direct azimuth and distance being:

2.  $195^{\circ} 57' 46''$ —43.00 feet;
3.  $194^{\circ} 17'$ —292.71 feet to the Halawa-Aiea boundary, being also the Northwest boundary of Portion C.

## EASEMENT 3-A

Honolulu Plantation Co.'s Easement for Railroad  
Sixteen (16) Feet Wide

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekua-naoa and Kamaikui.

Centerline Description.

Beginning at the Westerly end of this easement, and on the centerline of the Oahu Railway and Land Co.'s and Honolulu Plantation [427] Co.'s easement for railroad sixteen (16) feet wide, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3433.01 feet North and 8147.06 feet West, and running by azimuths measured clockwise from true South:

On a curve to the right, with a radius of 1055.44 feet, the direct azimuth and distance being:

1.  $250^{\circ} 17' 52''$ —331.51 feet;

## Exhibit A-1—(Continued)

2.  $259^{\circ} 20'$ —19.36 feet to the Northerly side of the new highway to Aiea Naval Hospital.

## EASEMENT 4-A

The United States of America Perpetual Easement Five (5) Feet Wide Dated May 28, 1940, Recorded in Liber 1581, Page 395, in the Bureau of Conveyances at Honolulu.

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekua-naoa and Kamaikui.

## Centerline Description.

Beginning on the Halawa-Aiea boundary, on the Northwest boundary of Portion C, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3870 feet North and 8188.87 feet West, and running by azimuths measured clockwise from true South:

1.  $339^{\circ} 42'$ —102.13 feet; [428]
2.  $338^{\circ} 32'$ —182.96 feet;
3.  $337^{\circ} 23'$ —126.71 feet;
4.  $250^{\circ} 51'$ —77.55 feet;
5.  $254^{\circ} 44'$ —115.67 feet;
6.  $262^{\circ} 50'$ —36.41 feet to the Northerly side of the new highway to Aiea Naval Hospital.

## Exhibit A-1—(Continued)

## EASEMENT 5-A

Honolulu Plantation Co.'s Easement for Ditch Six  
(6) Feet Wide

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekua-haoa and Kamaikui.

## Centerline Description.

Beginning on the Southerly boundary of Portion C, and on the Northerly side of the new highway to Aiea Naval Hospital, and on the centerline of the Honolulu Plantation Co.'s easement for ditch six (6) feet wide, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3683.26 feet North and 7193.66 feet West, and running by azimuths measured clockwise from true South:

1.  $225^{\circ} 54'$ —579.52 feet;
2.  $305^{\circ} 01'$ —134.00 feet;
3.  $268^{\circ} 30'$ —7.00 feet;
4.  $228^{\circ} 44'$ —66.25 feet; [429]
5.  $365^{\circ} 27'$ —356.40 feet;
6.  $336^{\circ} 32'$ —22.18 feet to the Northerly side of the new highway to Aiea Naval Hospital, being also the Southern boundary of Portion C.

## Exhibit A-1—(Continued)

## EASEMENT 7-A

Mutual Telephone Co.'s Easement for Telephone  
Line Ten (10) Feet wide

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land  
Commission Award 7712 and 8516-B to M. Ke-  
kuanaoa and Kamaikui.

Centerline description:

Beginning on the Southerly boundary of Portion  
C, on the Northerly side of the new highway to  
Aiea Naval Hospital, and on the centerline of the  
Mutual Telephone Co.'s easement for telephone line  
ten (10) feet wide, the coordinates of which re-  
ferred to Government Survey Triangulation Sta-  
tion "Salt Lake" being 3807.48 feet North and  
6428.76 feet West, and running by azimuths mea-  
sured clockwise from true South:

1.  $177^{\circ} 07'$ —48.32 feet;
2.  $203^{\circ} 51'$ —61.14 feet to the Southwest side of  
Moanalua Road. [430]

## EASEMENT 9-A

Honolulu Plantation Co.'s Easement for Electric  
Transmission Line Ten (10) Feet Wide

Land Situated at Halawa, Ewa, Oahu, T. H.  
Being a Portion of Royal Patent 6717, Land Com-  
mission Award 7712 and 8516-B to M. Kekuanaoa  
and Kamaikui.

## Exhibit A-1—(Continued)

## Centerline Description:

Beginning on the Southerly boundary of Portion B, on the Northerly side of the new highway to Aiea Naval Hospital, and on the centerline of the Honolulu Plantation Co.'s easement for electric transmission line ten (10) feet wide, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3689.93 feet North and 7152.58 feet West, and running by azimuths measured clockwise from true South:

1.  $137^{\circ} 55'$ —298.25 feet;
2.  $120^{\circ} 52'$ —461.30 feet to the Halawa-Aiea boundary, being also the Northwest boundary of Portion C. [431]

## EXHIBIT "A-2"

Description of 15.076 Acres of Land. Situated at the North Corner of Moanalua Road and Aiea Naval Hospital Road at Halawa, Ewa, Oahu T. H. [433]

B. P. Bishop Estate—Owner

Land Situated at the North Corner of Moanalua Road and Aiea Naval Hospital Road at Halawa, Ewa, Oahu, T. H.

Being a Portion of the Ahupuaa of Halawa and Being a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekuanaka and Kamaikui.

Beginning at a "†" on concrete at the West cor-

ner of this parcel of land, being also the South corner of the Aiea School Lot, and on the Northeast side of Moanalua Road, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 4166.08 feet North and 6677.62 feet West, and running by azimuths measured clockwise from true South:

1.  $215^{\circ} 27'$ —626.34 feet along remainder of the land of Halawa along Aiea School Lot to a pipe;
2.  $125^{\circ} 27'$ —342.65 feet along remainder of the land of Halawa along Aiea School Lot to a pipe;
3.  $237^{\circ} 47' 30''$ —253.00 feet along U. S. Naval Reservation 30-foot right-of-way along the Aiea-Halawa boundary to a pipe;
4.  $306^{\circ} 33'$ —204.40 feet along remainder of the land of Halawa to a pipe;
5.  $311^{\circ} 30' 30''$ —213.00 feet along remainder of the land of Halawa to a pipe;
6.  $314^{\circ} 50'$ —84.65 feet along remainder of the land of Halawa to a pipe;
7.  $321^{\circ} 55'$ —598.40 feet along remainder of the land of Halawa to a pipe;
8.  $42^{\circ} 27'$ —443.40 feet along remainder of the land of Halawa to the North side of the Aiea Naval Hospital Road to a pipe;
9.  $80^{\circ} 46' 30''$ —299.30 feet along the North side of the Aiea Naval Hospital Road to a pipe;
10.  $125^{\circ} 27'$ —560.19 feet along the Northeast side of Moanalua Road to the point of beginning

and containing an area of 15.076 acres, and as delineated on 14th Naval District Drawing No. OA-N1-626.

Subject to the following easements, said easements being delineated on the aforesaid drawing:

**EASEMENT TEN (10) FEET WIDE FOR  
UNDERGROUND PIPELINE**

Being a Strip of Land Ten (10) Feet Wide Extending Five (5) Feet on Each Side of the Following Described Centerline:

Beginning at the Southwest end of this easement, and on the Northeast side of Moanalua Road the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 4075.60 feet North and 6550.54 feet West, and running by azimuths measured clockwise from true South:

1.  $213^{\circ} 53' 30''$ —179.08 feet;
2.  $215^{\circ} 27'$ —656.90 feet.

Area—8,360 square feet.

**EASEMENT TEN (10) FEET WIDE FOR  
DITCH PURPOSES**

Being a Strip of Land Ten (10) Feet Wide Extending Five (5) Feet on Each Side of the Following Described Centerline:

Beginning at the West end of this easement, and on the Northeast side of Moanalua Road, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3845.30

feet North and 6227.07 feet West, and running by an azimuth measured clockwise from true South:

1.  $260^{\circ} 46' 30''$ —310.68 feet.

Area—3,107 square feet.

/s/ R. M. TOWILL,

Registered Professional Surveyor Certificate Number 151.

Honolulu, T. H., April 19, 1943.

[435]

### EXHIBIT A-3

#### AIEA BARRACKS

#### 2ND ADDITIONAL AND 3RD ADDITIONAL

Land Situated at Halawa and Aiea, Ewa,  
Oahu, T. H.

Descriptions of:

Aiea Barracks 2nd Additional. Apparent owner: B. P. Bishop Estate; area, 26.195 acres.

Aiea Barracks 3rd Additional (Honolulu Plantation Co. Land). Apparent owner: Honolulu Plantation Co.; area, 2.732 acres.

Aiea Barracks 3rd Additional (B. P. Bishop Estate Land). Apparent owner: B. P. Bishop Estate; area, 1.716 acres.

Parcel T-1. Apparent owner: Territory of Hawaii; area 0.676 acre.

Parcel U-1. Apparent owner: United States of America; area 0.670 acre. [437]

## Exhibit A-3—(Continued)

## AIEA BARRACKS 2ND ADDITIONAL

Land Situated on the North Side of Aiea Naval Hospital Road and East of Aiea Barracks 1st Additional at Halawa, Ewa, Oahu, T. H.

Being a Portion of the Ahupuaa of Halawa and Being Also a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekuanaoa and Kamaikui.

Beginning at a pipe at the Southwest corner of this parcel of land, on the North side of Aiea Naval Hospital Road, and being also the Southeast corner of Aiea Barracks 1st Additional, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3,889.15 feet North and 5,925.85 feet West, and running by azimuths measured clockwise from true South:

1.  $222^{\circ} 27'$ —443.40 feet along Aiea Barracks 1st Additional, being also along a remainder of the land of Halawa, to a pipe;
2.  $141^{\circ} 55'$ —598.40 feet along Aiea Barracks 1st Additional, being also along a remainder of the land of Halawa, to a pipe;
3.  $134^{\circ} 50'$ —84.65 feet along Aiea Barracks 1st Additional, being also along a remainder of the land of Halawa, to a pipe;
4.  $131^{\circ} 30' 30''$ —213.00 feet along Aiea Barracks 1st Additional, being also along a remainder of the land of Halawa, to a pipe;
5.  $126^{\circ} 33'$ —204.40 feet along Aiea Barracks 1st

## Exhibit A-3—(Continued)

Additional, being also along a [438] remainder of the land of Halawa, to a pipe;

6.  $237^{\circ} 47' 30''$ —318.67 feet along U. S. Naval Reservation to a pipe;
7.  $295^{\circ} 12'$ —118.10 feet along a remainder of the land of Halawa to a pipe;
8.  $285^{\circ} 14'$ —96.50 feet along a remainder of the land of Halawa to a pipe;
9.  $279^{\circ} 02'$ —110.20 feet along a remainder of the land of Halawa to a pipe;
10.  $300^{\circ} 22'$ —167.40 feet along a remainder of the land of Halawa to a pipe;
11.  $236^{\circ} 42'$ —71.10 feet along a remainder of the land of Halawa to a pipe;
12.  $302^{\circ} 06'$ —78.30 feet along a remainder of the land of Halawa to a pipe;
13.  $294^{\circ} 24'$ —46.40 feet along a remainder of the land of Halawa to a pipe;
14.  $280^{\circ} 48'$ —69.50 feet along a remainder of the land of Halawa to a pipe;
15.  $268^{\circ} 39' 30''$ —191.23 feet along a remainder of the land of Halawa to a pipe;
16.  $289^{\circ} 57' 30''$ —193.83 feet along a remainder of the land of Halawa to a pipe; thence along a remainder of the land of Halawa, on a curve to the right, with a radius of 460.00 feet, the chord azimuth and distance being,
17.  $314^{\circ} 05' 45''$ —376.21 feet;
18.  $338^{\circ} 14'$ —529.30 feet along a remainder of the land of Halawa to the Northerly side of Aiea Naval Hospital Road; thence along the North-

## Exhibit A-3—(Continued)

erly side of Aiea Naval Hospital Road, on a curve to the left, with a radius of 5759.58 feet, the chord azimuth and distance being,

19.  $83^{\circ} 24' 18''$ —328.35 feet to a pipe; [439]
20.  $171^{\circ} 46' 18''$ —15.00 feet along the East side of Aiea Naval Hospital Road to a pipe; thence along the North side of Aiea Naval Hospital Road, on a curve to the left, with a radius of 5774.58 feet, the chord azimuth and distance being,
21.  $81^{\circ} 16' 24''$ —100.45 feet to a pipe;
22.  $80^{\circ} 46' 30''$ —700.31 feet along the North side of Aiea Naval Hospital Road to a pipe;
23.  $350^{\circ} 46' 30''$ —15.00 feet along the West side of Aiea Naval Hospital Road to a pipe;
24.  $80^{\circ} 46' 30''$ —240.73 feet along the North side of Aiea Naval Hospital Road to the point of beginning and containing an area of 26.195 acres, and as delineated on the 14th Naval District Drawing No. OA-N1-1076.

Subject to Easements A-4, A-5 and B hereinafter described, said easements being delineated on the aforesaid drawing. [440]

**AIEA BARRACKS 3RD ADDITIONAL**  
(Honolulu Plantation Co. Land)

Land Situated at Aiea, Ewa, Oahu, T. H.

Being Land Quitclaimed by the United States of America to Waialua Agricultural Co., Ltd., by Deed Dated January 26, 1929 and Recorded in the

## Exhibit A-3—(Continued)

Bureau of Conveyances at Honolulu in Liber 1000, Page 14, and Being Also the Land Conveyed by Waialua Agricultural Co., Ltd., to Honolulu Plantation Co. by Deed Dated January 29, 1929 and Recorded in the Bureau of Conveyances at Honolulu in Liber 1002, Page 91.

Beginning at a pipe at the South corner of this parcel of land, on the Northeast side of Moanalua Road, being also the West corner of Parcel T-1 (government road 30 feet wide), the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 4,551.82 feet North and 7-219.78 feet West, and running by azimuths measured clockwise from true South:

1.  $125^{\circ} 15' 10''$ —238.28 feet along the Northeast side of Moanalua Road to the Southerly side of Oahu Railway and Land Company's railroad right-of-way; thence along the Southerly side of Oahu Railway and Land Company's railroad right-of-way, on a curve to the right, with a radius of 935.40 feet, the chord azimuth and distance being,
2.  $241^{\circ} 21' 50''$ —397.03 feet;
3.  $253^{\circ} 37'$ —203.85 feet along the Southerly side of Oahu Railway and Land Company's railroad right-of-way; [441] thence along the Southerly side of Oahu Railway and Land Company's railroad right-of-way, on a curve to the left, with a radius of 657.30 feet, the chord azimuth and distance being,

## Exhibit A-3—(Continued)

4.  $25^{\circ} 44' 47''$ —65.83 feet;
5.  $33^{\circ} 24'$ —125.45 feet along Aiea Barracks 3rd Additional (B. P. Bishop Estate Land), being also along Grant 10197 to B. P. Bishop Estate;
6.  $57^{\circ} 49' 30''$ —559.49 feet along Parcel T-1 (government road 30 feet wide) to the point of beginning and containing an area of 2.732 acres, and as delineated on 14th Naval District Drawing No. OA-N1-1076.

Subject to Easements C-1 and D-1 hereinafter described, said easements being delineated on the aforesaid drawing. [442]

**AIEA BARRACKS 3RD ADDITIONAL**  
(B. P. Bishop Estate Land)

Land Situated at Aiea, Ewa, Oahu, T. H.

Being a Portion of Grant 10197 to B. P. Bishop Estate.

Beginning at the South corner of this parcel of land, on the Northwest boundary of Parcel T-1 (government road 30 feet wide), being also the East corner of Aiea Barracks 3rd Additional (Honolulu Plantation Company Land), the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 4,849.76 feet North and 6,746.21 feet West, and running by azimuths measured clockwise from true South:

1.  $150^{\circ} 24'$ —125.45 feet along Aiea Barracks 3rd

## Exhibit A-3—(Continued)

Additional (Honolulu Plantation Company Land) to the Southerly side of Oahu Railway and Land Company's railroad right-of-way; thence along the Southerly side of Oahu Railway and Land Company's railroad right-of-way, on a curve to the left, with a radius of 657.30 feet, the chord azimuth and distance being,

2.  $239^{\circ} 56' 17''$ —181.54 feet;
3.  $232^{\circ} 00'$ —174.15 feet along a remainder of Grant 10197 to B. P. Bishop Estate; thence along a remainder of Grant 10197 to B. P. Bishop Estate, on a curve to the right, with a radius of 343.17 feet, the chord azimuth and distance being,
4.  $257^{\circ} 57'$ —300.33 feet; [443] thence along a remainder of Grant 10197 to B. P. Bishop Estate, on a curve to the left, with a radius of 613.14 feet, the chord azimuth and distance being,
5.  $306^{\circ} 31' 06''$ —34.99 feet to the Northwest side of government road 30 feet wide;
6.  $57^{\circ} 47' 30''$ —655.00 feet along government road 30 feet wide and along Parcel T-1 to the point of beginning and containing an area of 1.716 acres, and as delineated on 14th Naval District Drawing No. OA-N1-1076.

Subject to Easement A-1 hereinafter described, said easement being delineated on the aforesaid drawing. [444]

## Exhibit A-3—(Continued)

## PARCEL T-1

Land Situated on the Northeast Side of Moanalua Road at Aiea, Ewa, Oahu, T. H.

Being a Portion of Government Road Thirty (30) Feet Wide.

Beginning at a pipe at the West corner of this parcel of land, on the North side of Moanalua Road, being also the South corner of Aiea Barracks 3rd Additional (Honolulu Plantation Company Land), the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 4,551.82 feet North and 7,219.78 feet West, and running by azimuths measured clockwise from true South:

1.  $237^{\circ} 49' 30''$ —559.49 feet along Aiea Barracks 3rd Additional (Honolulu Plantation Company Land);
2.  $237^{\circ} 47' 30''$ —480.27 feet along Aiea Barracks 3rd Additional (B. P. Bishop Estate Land);
3.  $41^{\circ} 45'$ —108.56 feet crossing government road 30 feet wide;
4.  $57^{\circ} 47' 30''$ —377.30 feet along Parcel U-1, U. S. Naval Reservation;
5.  $57^{\circ} 49' 30''$ —545.67 feet along Parcel U-1, U. S. Naval Reservation, to the Northeast side of Moanalua Road;
6.  $125^{\circ} 15' 10''$ —32.49 feet along the Northeast side of Moanalua Road to the point of beginning and containing an area of 0.676 acre, and

## Exhibit A-3—(Continued)

as delineated on 14th Naval District Drawing No. OA-N1-1076.

Subject to Easements A-2, C-2 and D-2 hereinafter described, said easements being delineated on the aforesaid drawing. [445]

## PARCEL U-1

Land Situated on the Northeast Side of Moanalua Road at Aiea, Ewa, Oahu, T. H.

Being a Portion of U. S. Naval Reservation Thirty (30) Feet Wide.

Beginning at the South corner of this parcel of land, on the Northeast side of Moanalua Road, being also the West corner of Aiea School Lot, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 4,514.31 feet North and 7,166.72 feet West, and running by azimuths measured clockwise from true South:

1.  $125^{\circ} 27'$ —0.53 foot along the Northeast side of Moanalua Road;
2.  $125^{\circ} 15' 10''$ —31.96 feet along the Northeast side of Moanalua Road;
3.  $237^{\circ} 49' 30''$ —545.67 feet along Parcel T-1 (government road 30 feet wide);
4.  $237^{\circ} 47' 30''$ —485.92 feet partly along Parcel T-1 and along government road 30 feet wide;
5.  $41^{\circ} 45'$ —108.56 feet crossing U. S. Naval Reservation 30 feet wide;

## Exhibit A-3—(Continued)

6.  $57^{\circ} 47' 30''$ —381.90 feet partly along Aiea Barracks 1st Additional and along Aiea School Lot to a concrete monument;
7.  $57^{\circ} 49' 30''$ —532.90 feet along Aiea School Lot to the point of beginning and containing an acre of 0.670 acre, and as delineated on 14th Naval District Drawing No. OA-N1-1076. [446]

Subject to Easements A-3 and C-3 hereinafter described, said easements being delineated on the aforesaid drawing. [447]

## EASEMENT A-1

Description of Centerline of Irrigation Pipeline Right-of-Way for Honolulu Plantation Co.

Beginning at the Northwest end of this easement, on the Northwesterly boundary of Aiea Barracks 3rd Additional (B. P. Bishop Estate Land), the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 5,177.52 feet North and 6,484.50 feet West, and running by azimuths measured clockwise from true South:

1.  $320^{\circ} 53'$ —69.87 feet;
2.  $324^{\circ} 40' 30''$ —68.59 feet to the Southeast boundary of Aiea Barracks 3rd Additional (B. P. Bishop Estate Land), the true azimuth and distance to the initial point of Aiea Barracks 3rd Additional (B. P. Bishop Estate Land), being  $57^{\circ} 47' 30''$  408.27 feet, and as delineated

## Exhibit A-3—(Continued)

on 14th Naval District Drawing No. OA-N1-1076.

## EASEMENT A-2

Description of Centerline of Irrigation Pipeline Right-of-Way for Honolulu Plantation Co.

Beginning at the Northwest end of this easement, on the Northwest boundary of Parcel T-1 and the Southeast boundary of Aiea Barracks 3rd Additional (B. P. Bishop Estate Land), the coordinates of which referred to Government Survey Triangulation Station "Salt [448] Lake" being 5,067.35 feet North and 6,400.76 feet West, and running by azimuth measured clockwise from true South:

1. 324° 40' 30"—20.41 feet to the Southeast boundary of Parcel T-1, the true azimuth and distance to the end of the 3rd course of Parcel T-1 being 41° 45' 34.80 feet, and as delineated on 14th Naval District Drawing No. OA-N1-1076.

## EASEMENT A-3

Description of Centerline of Irrigation Pipeline Right-of-Way for Honolulu Plantation Co.

Beginning at the Northwest end of this easement, on the Northwest boundary of Parcel U-1, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 5,042.84 feet North and 6,383.39 feet West, and run-

## Exhibit A-3—(Continued)

ning by an azimuth measured clockwise from true South:

1.  $324^{\circ} 40' 30''$ —21.15 feet to the Southeast boundary of Parcel U-1, the true azimuth and distance to the end of the 5th course of Parcel U-1 being  $41^{\circ} 45' 32.10$  feet, and as delineated on 14th Naval District Drawing No. OA-N1-1076. [449]

## EASEMENT A-4

Description of Centerline of Irrigation Pipeline Right of-Way for Honolulu Plantation Co.

Beginning at the West end of this easement, on the Northwest boundary of Aiea Barracks 2nd Additional, and on the Southeast side of U. S. Naval Reservation 30 feet wide, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 5,018.33 feet North and 6,366.02 feet West, and running by azimuths measured clockwise from true South:

1.  $279^{\circ} 32'$ —136.29 feet;
2.  $305^{\circ} 29'$ —685.71 feet;
3.  $299^{\circ} 41' 30''$ —455.79 feet;
4.  $313^{\circ} 19'$ —257.21 feet;
5.  $342^{\circ} 34'$ —61.31 feet;
6.  $291^{\circ} 18' 30''$ —184.28 feet to the end of the 20th course of Aiea Barracks 2nd Additional and as delineated on 14th Naval District Drawing No. OA-N1-1076.

## Exhibit A-3—(Continued)

## EASEMENT A-5

Description of Centerline of Irrigation Ditch  
Right-of-Way for Honolulu Plantation Co.

Beginning at the North end of this easement, on the Northerly boundary of Aiea Barracks 2nd Additional, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" [450] being 5,097.84 feet North and 5,870.32 feet West, and running by azimuths measured clockwise from true South:

1.  $17^{\circ} 17'$ —42.41 feet;
2.  $34^{\circ} 54'$ —200.00 feet;
3.  $8^{\circ} 29'$ —59.00 feet to the centerline of Easement A-4, the true azimuth and distance to the end of the 1st course of Easement A-4 being  $125^{\circ} 29'$  277.00 feet, and as delineated on 14th Naval District Drawing No. OA-N1-1076.

## EASEMENT B

Description of Centerline of Irrigation Ditch for  
Honolulu Plantation Co.

Beginning at the North end of this easement, on the Easterly boundary of Aiea Barracks 2nd Additional, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 4,615.57 feet North and 4,781.82 feet West, and running by azimuths measured clockwise from true South:

1.  $12^{\circ} 31' 30''$ —71.99 feet;

## Exhibit A-3—(Continued)

2.  $360^{\circ} 00'$ —70.00 feet;
3.  $336^{\circ} 30'$ —60.00 feet;
4.  $345^{\circ} 00'$ —160.00 feet;
5.  $319^{\circ} 00'$ —45.00 feet;
6.  $337^{\circ} 00'$ —50.00 feet;
7.  $18^{\circ} 00'$ —60.00 feet;
8.  $338^{\circ} 30'$ —50.00 feet to the Southerly boundary of [451] Aiea Barracks 2nd Additional, the true azimuth and distance to the end of the 18th course of Aiea Barracks 2nd Additional being  $264^{\circ} 28' 53''$  112.00 feet, and as delineated on 14th Naval District Drawing No. OA-N1-1076.

## EASEMENT C-1

Description of Centerline of Electric Transmission Line for Hawaiian Electric Co., Ltd.

Beginning at the Northwest end of this easement, on the Northwest boundary of Aiea Barracks 3rd Additional (Honolulu Plantation Co. Land), the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 4,905.05 feet North and 6,979.45 feet West, and running by an azimuth measured clockwise from true South:

1.  $332^{\circ} 21'$ —171.54 feet to the Southeast boundary of Aiea Barracks 3rd Additional (Honolulu Plantation Co. Land), the true azimuth and distance to the end of the 6th course of Aiea Barracks 3rd Additional (Honolulu

## Exhibit A-3—(Continued)

Plantation Co. Land) being  $237^{\circ} 49' 30''$  181.51 feet, and as delineated on 14th Naval District Drawing No. OA-N1-1076.

## EASEMENT C-2

Description of Centerline of Electric Transmission Line for Hawaiian Electric Co., Ltd.

Beginning at the Northwest end of this easement, on the Northwest boundary of Parcel T-1 and the Southeast boundary of Aiea [452] Barracks 3rd Additional (Honolulu Plantation Co. Land), the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 4,753.10 feet North and 6,899.84 feet West, and running by an azimuth measured clockwise from true South:

1.  $332^{\circ} 21'$ —30.09 feet to the Southeast boundary of Parcel T-1, the true azimuth and distance to the end of the 5th course of Parcel T-1 being  $57^{\circ} 49' 30''$  363.13 feet, and as delineated on 14th Naval District Drawing No. OA-N1-1076.

## EASEMENT C-3

Description of Centerline of Electric Transmission Line for Hawaiian Electric Co., Ltd.

Beginning at the Northwest end of this easement, on the Northwest boundary of Parcel U-1 and the Southeast boundary of Parcel T-1, the co-

## Exhibit A-3—(Continued)

ordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 4,726.45 feet North and 6,885.88 feet West, and running by an azimuth measured clockwise from true South:

1.  $332^{\circ} 21'$ —30.09 feet to the Southeast boundary of Parcel U-1, the true azimuth and distance to the initial point of Parcel U-1 being  $57^{\circ} 49' 30''$  348.29 feet, and as delineated on 14th Naval District Drawing No. OA-N1-1076.

## EASEMENT D-1

Description of Centerline of Telephone Line for Mutual Telephone Co.

Beginning at the Northwest end of this easement, on the Northwest boundary of Aiea Barracks 3rd Additional (Honolulu Plantation Co. Land), the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 4,777.04 feet North and 7,295.28 feet West, and running by an azimuth measured clockwise from true South:

1.  $322^{\circ} 17'$ —231.92 feet to the Southeast boundary of Aiea Barracks 3rd Additional (Honolulu Plantation Co. Land), the true azimuth and distance to the initial point of Aiea Barracks 3rd Additional (Honolulu Plantation Co. Land) being  $57^{\circ} 49' 30''$  78.41 feet, and as delineated on 14th Naval District Drawing No. OA-N1-1076.

## Exhibit A-3—(Continued)

## EASEMENT D-2

Description of Centerline of Telephone Line for Mutual Telephone Co.

Beginning at the East end of this easement, on the Northwest boundary of Parcel T-1 and the Southeast boundary of Aiea Barracks 3rd Additional (Honolulu Plantation Co. Land), the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 4,593.57 feet North and 7,153.41 feet West, and running [454] by an azimuth measured clockwise from true South:

1.  $55^{\circ} 04' 30''$ —76.96 feet to the Northeast side of Moanalua Road, the true azimuth and distance to the initial point of Parcel T-1 being  $125^{\circ} 15' 10''$  4.00 feet, and as delineated on 14th Naval District Drawing No. OA-N1-1076.

/s/ R. M. TOWILL,

Registered Professional Surveyor Certificate Number 151.

Honolulu, T. H., September 21, 1944.

[Endorsed]: Filed Oct. 11, 1944.

[455]

[Title of District Court and Cause No. 535.]

### DECLARATION OF TAKING

Whereas, pursuant to the Acts of Congress approved March 27, 1942 (Public Law 507, 77th Congress), June 26, 1943 (Public Law 92, 78th Congress), and January 28, 1944 (Public Law 224, 78th Congress), the above styled condemnation proceeding has been instituted.

Now, Therefore, pursuant to the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), I, Secretary of the Navy, do hereby make and cause to be filed this declaration of taking, and by virtue of authority thereof do hereby state that the lands selected for acquisition aggregate 145.225 acres, more or less, at Halawa and Aiea, Ewa, Territory of Hawaii, more particularly described in Exhibit "A" attached hereto and made a part hereof. The lands are delineated on maps entitled "Aiea Barracks Boundary Survey," 14th Naval District Drawing OA-N1-490, "Aiea Barracks First Additional," 14th Naval District Drawing No. OA-N1-626, and "Aiea Barracks 2nd Additional and 3rd Additional," 14th Naval District Drawing [457] No. OA-N1-1076, attached hereto as Exhibits "B-1", "B-2", and "B-3", respectively, and made a part hereof.

And I do declare said lands to be taken under the authority of the aforesaid Acts of Congress: that the use to which said lands are to be put is in connection with the Aiea Naval Barracks as auth-

orized by said acts; and that the estate hereby taken in said lands for the public use aforesaid is title in fee simple, subject, however, to the following rights and reservations:

1. As to Portion B of the lands described in Exhibit "A", and delineated on Exhibit "B-1" subject to:

A. The existing right of the Hawaiian Electric Company, Limited, its successors and assigns, to operate, maintain, and repair, electric power transmission poles and wire lines, together with the right of ingress and egress for such purposes, over the rights of way, the centerlines of which are described in Exhibit "A" and delineated on Exhibit "B-1", attached hereto, as Easements 1-A, 1-B, and 8-A; said right having been acquired by said Hawaiian Electric Company, Limited, from the Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, by (1) unrecorded lease No. 5877, dated December 1, 1937, expiring January 1, 1966, and (2) by that certain lease agreement No. 7117, from the Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, dated July 1, 1943, expiring December 31, 1965, and recorded in the Bureau of Conveyances of the Territory of Hawaii in Liber 1787, at page 259.

B. The right hereby reserved unto George Miles Collins, John Kirkwood Clarke, Frank Elbert Midkiff, Edwin Pauhaulani Murray and Joseph Boyd Poindexter, as Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, and to their successors in trust, assigns and lessees, to operate,

maintain, and repair [458] the following facilities for plantation purposes, together with the right of ingress and egress for such purposes, for so long only as the rights of way over which said facilities pass are used for such purposes:

(a) Electric power transmission poles and wire lines over the right of way, the centerline of which is described in and delineated on Exhibits "A" and "B-1", attached hereto as Easement 9-B;

(b) Irrigation ditches over and along the rights of way, the centerlines of which are described in, and delineated on Exhibits "A" and "B-1," attached hereto as Easements 5-B and 6-A;

(c) A pipeline under and along the right of way, the centerline of which is described in, and delineated on Exhibits "A" and "B-1", attached hereto as Easement 6;

2. As to Portion C of the lands described in Exhibit "A" and delineated on Exhibit "B-1", subject to;

A. The existing right of the Hawaiian Electric Company, Limited, its successors and assigns, to operate, maintain, and repair, electric power transmission poles and wire lines, together with the right of ingress and egress for such purposes, over the the right of way, the centerline of which is described in Exhibit "A" and delineated on Exhibit "B-1", attached hereto as Easement 1-C: said right having been acquired by the said Hawaiian Electric Company, Limited, from the Trustees under the

Will and of the Estate of Bernice P. Bishop, Deceased, by unrecorded lease No. 5877, dated December 1, 1937, expiring January 1, 1966.

B. The right hereby reserved unto George Miles Collins, John Kirkwood Clarke, Frank Elbert Midkiff, Edwin Pauhaulani Murray, and Joseph Boyd Poindexter, as Trustees under the [459] Will and of the Estate of Bernice P. Bishop, Deceased, and to their successors in trust, assigns and lessees, to operate, maintain, and repair the following facilities for plantation purposes, together with the right of ingress and egress for such purposes, for so long only as the rights of way over which said facilities pass are used for such purposes:

(a) Electric power transmission poles and wire lines over the right of way, the centerline of which is described in and delineated on Exhibits "A" and "B-1", attached hereto as Easement 9-A;

(b) Railway tracks and facilities, including the operation of locomotives and cars over the same over the centerline described in and delineated on Exhibits "A" and "B-1", attached hereto as Easement 2;

(c) A pipeline under and along the centerline of the right of way described in and delineated on Exhibits "A" and "B-1", attached hereto as Easement 5-A;

3. As to the lands described in Exhibit "A" and delineated on Exhibit "B-2" as "Aiea Barracks 1st Additional," subject to:

A. The right hereby reserved unto George Miles Collins, John Kirkwood Clarke, Frank Elbert Mid-

kiff, Edwin Pauhaulani Murray and Joseph Boyd Poindexter, as Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, and to their successors in trust, assigns and lessees, to operate, maintain, and repair the following facilities for plantation purposes, together with the right of ingress and egress for such purposes for so long only as the rights of way over which said facilities pass are used for such purpose: [460]

(a) Pipelines under and along the centerlines of the rights of way described in and designated on Exhibits "A" and "B-2", attached hereto as Easements A-6 and A-7.

4. As to the lands described in Exhibit "A" and delineated on Exhibit "B-3" as "Aiea Barracks 2nd and 3rd Additional" subject to:

A. The right hereby reserved unto George Miles, Collins, John Kirkwood Clarke, Frank Elbert Midkiff, Edwin Pauhaulani Murray and Joseph Boyd Poindexter, as Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, and to their successors in trust, assigns and lessees, to operate, maintain, and repair the following facilities for plantation purposes, together with the right of ingress and egress for such purposes, for so long only as the rights of way over which said facilities pass are used for such purposes:

(a) Irrigation ditches over and along the centerlines of the rights of way described in and delineated on Exhibits "A" and "B-3" attached hereto as Easements B and A-5;

(b) Pipelines under and along the centerline of

the right of way described in and designated on Exhibits "A" and "B-3" attached hereto as Easements A-1 and A-4.

And I do hereby state that the sum of money estimated by me to be just compensation for all of said lands, improvements thereon, and appurtenances thereunto belonging is Seventy One Thousand Four Hundred Fifty Eight Dollars (\$71,458.00), which said sum is hereby deposited into the registry of the court for the use and benefit of the persons entitled thereto, and the amounts of just compensation for said lands [461] and improvements thereon, which are hereby taken are shown on Schedule "A" which is attached hereto and made a part of this declaration of taking.

I am of the opinion that the ultimate award for the taking of said lands will be within the limits prescribed by Congress.

In Witness Whereof, the petitioner, by and through the Secretary of the Navy, has caused this declaration of taking to be signed on the 4th day of August, 1945, in the City of Washington, District of Columbia.

UNITED STATES  
OF AMERICA,

By /s/ JOHN L. SULLIVAN,  
Acting.

[462]

SCHEDULE "A"

The names of the persons having title to or other interest in the lands described in the within declaration of taking and the amounts estimated to be fair competition for each respective ownership, including all improvements thereon are as follows:

Parcel	Name of Owner	Estimated Just	
		Acres	Compensation
Portion A as shown on 14th ND Dwg. No. OA-N1-490 (Ex. B1)	L. L. McCandless Estate	0.545	\$ 231.00
Portion B as shown on 14th ND Dwg. No. OA-N1-490 (Ex. B-1)	B. P. Bishop Est.	73.923	36,242.50
Portion C as shown on 14th ND Dwg. No. OA-N1-490 (Ex. B-1)	B. P. Bishop Est.	25.038	12,125.00
1st Additional Area as shown on 14th ND Dwg. No. OA-N1-626 (Ex. B-2)	B. P. Bishop Est.	15.076	7,538.00
2nd Additional Area as shown on 14th ND Dwg. No. OA-N1-1076 (Ex. B-3)	B. P. Bishop Est.	26.195	13,097.50
3rd Additional Area as shown on 14th ND Dwg. No. OA-N1-1076 (Ex. B-3)	Honolulu Plantation Company	2.732	1,366.00
3rd Additional Area as shown on 14th ND Dwg. No. OA-N1-1076 (Ex. B-3)	B. P. Bishop Est.	1.716	858.00
Total		145.225	\$ 71,458.00

## EXHIBIT A

DESCRIPTIONS OF PORTIONS A, B, AND C,  
LAND SITUATED AT HALAWA,  
EWA, OAHU, T. H.

Revised October 11, 1943

To Conform to the Widening of Kamehameha  
Highway

## PORTION A

Estate of L. L. McCandless—Owner

Land situated near the Southeast side of Kamehameha Highway approximately 300 feet East of Halawa Bridge at Halawa, Ewa, Oahu, T. H.

Being the Whole of Royal Patent 457, Land Commission Award 2131, Apana 1 to Kanihoalii for Kaukiwaa.

Beginning at the Southwest corner of this parcel of land, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 763.60 feet North and 9583.20 feet West, and running by azimuths measured clockwise from true South:

1.  $164^{\circ} 00'$ —124.00 feet along L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui;
2.  $155^{\circ} 00'$ —186.00 feet along L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui;
3.  $234^{\circ} 00'$ —83.00 feet along L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui;
4.  $338^{\circ} 15'$ —319.00 feet along L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui;

Exhibit A—(Continued)

5.  $61^{\circ} 00'$ —83.00 feet along L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to the point of beginning and containing an area of 0.545 acres, and as delineated on 14th Naval District Drawing No. OA-N1-490. [465]

PORTION B

Trustees of B. P. Bishop Estate—Owners

Land situated on the Southeast side of Kamehameha Highway and on the southerly side of new highway to Aiea Naval Hospital and on the Southwest side of Moanalua Road at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land Commission Award 7712 at 8516-B to M. Kekuanaoa and Kamaikui.

Beginning at a pipe at the North corner of this parcel of land, at the South corner of the new highway to Aiea Naval Hospital and Moanalua Road, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3780.28 feet North and 6221.95 feet West, and running by azimuths measured clockwise from true South:

1.  $305^{\circ} 27'$ —53.56 feet along the Southwest side of Moanalua Road to a pipe. Thence along the Southwest side of Moanalua Road, on a curve to the left, with a radius of 1007.00 feet, the direct azimuth and distance being:

## Exhibit A—(Continued)

2.  $294^{\circ} 03' 09''$ —398.00 feet to a pipe;
3.  $25^{\circ} 53'$ —151.85 feet along the remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
4.  $59^{\circ} 25'$ —54.00 feet along remainder of L. C. Aw. 7712 [466] and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
5.  $63^{\circ} 59'$ —244.60 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
6.  $69^{\circ} 59'$ —169.60 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
7.  $86^{\circ} 26' 30''$ —188.50 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
8.  $97^{\circ} 48'$ —112.80 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
9.  $78^{\circ} 52'$ —197.40 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
10.  $79^{\circ} 49'$ —188.00 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
11.  $66^{\circ} 23'$ —99.50 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
12.  $82^{\circ} 43'$ —115.80 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;

Exhibit A—(Continued)

13. 75° 40'—201.10 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
14. 62° 17'—186.20 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
15. 76° 08'—117.50 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
16. 79° 06' 30"—110.90 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
17. 69° 09'—77.50 feet along remainder of L. C. Aw. 7712 [467] and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
18. 39° 42'—98.10 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
19. 5° 03' 30"—176.20 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
20. 13° 31'—174.60 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
21. 58° 35'—27.50 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
22. 94° 12'—243.30 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
23. 55° 19'—189.90 feet along remainder of L. C.

## Exhibit A—(Continued)

- Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
24. 45° 00'—167.10 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
25. 19° 47'—122.55 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
26. 3° 16' 30"—54.65 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
27. 325° 54'—111.65 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
28. 298° 50'—149.50 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
29. 299° 31'—166.55 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
30. 351° 36'—71.95 feet along remainder of L. C. Aw. 7712 [468] and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
31. 14° 29'—77.40 feet along remainder of L. C. Aw. 7712 and 8516-B to a pipe;
32. 28° 13'—90.85 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
33. 48° 35'—288.20 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;

Exhibit A—(Continued)

34. 53° 06'—131.25 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
35. 39° 11'—90.05 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
36. 59° 42'—36.10 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
37. 89° 41'—160.10 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
38. 32° 32'—139.60 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
39. 46° 50' 30"—188.70 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
40. 34° 14' 30"—72.35 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
41. 36° 25'—223.26 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui;
42. 53° 00'—130.00 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui;
43. 347° 24'—72.10 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamikui to a pipe; [469]

## Exhibit A—(Continued)

44.  $101^{\circ} 16'$ —110.10 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
45.  $96^{\circ} 05'$ —124.70 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
46.  $81^{\circ} 30'$ —80.00 along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
47.  $350^{\circ} 30'$ —197.25 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to a pipe;
48.  $66^{\circ} 55'$ —54.53 feet along remainder of L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to the middle of Halawa Stream. Thence following down along Halawa Stream along Parcel 4-C of the Makalapa Lands for the next two (2) courses, the direct azimuths and distances between points in middle of said stream being:
49.  $153^{\circ} 26'$ —25.00 feet;
50.  $123^{\circ} 50'$ —325.29 feet to the Southeast side of Kamehameha Highway;
51.  $203^{\circ} 32'$ —116.70 feet along the Southeast side of Kamehameha Highway;
52.  $293^{\circ} 32'$ —15.00 feet along the Southeast side of Kamehameha Highway; [470]
53.  $203^{\circ} 32'$ —710.19 feet along the Southeast side of Kamehameha Highway. Thence along the Southeast side of Kamehameha Highway, on

Exhibit A—(Continued)

a curve to the right, with a radius of 5679.65 feet, the direct azimuth and distance being:

54. 204° 25' 57"—178.26 feet;
55. 115° 19' 54"—15.00 feet along the Southeast side of Kamehameha Highway. Thence along the Southeast side of Kamehameha Highway, on a curve to the right, with a radius of 5694.65 feet, the direct azimuth and distance being:
56. 207° 13' 42"—376.95 feet;
57. 209° 07' 30"—1204.14 feet along the Southeast side of Kamehameha Highway. Thence along the Southeast side of the new highway to Aiea Naval Hospital, on a curve to the right, with a radius of 400.00 feet, the direct azimuth and distance being:
58. 225° 41' 45"—228.16 feet;
59. 242° 16'—392.61 feet along the Southeast side of the new highway to Aiea Naval Hospital. Thence along the Southeast side of the new highway to Aiea Naval Hospital, on a curve to the right, with a radius of 2834.79 feet, the direct azimuth and distance being:
60. 249° 06' 55"—676.08 feet;
61. 345° 57' 50"—5.00 feet along the Southerly side of the new highway to Aiea Naval Hospital. Thence along the Southerly side of the new highway to Aiea Naval [471] Hospital, on a curve to the right, with a radius of 2829.79 feet, the direct azimuth and distance being:

Exhibit A—(Continued)

62.  $258^{\circ} 22' 10''$ —237.55 feet;
63.  $260^{\circ} 46' 30''$ —121.70 feet along the Southerly side of the new highway to Aiea Naval Hospital;
64.  $170^{\circ} 46' 30''$ —5.00 feet along the Southerly side of the new highway to Aiea Naval Hospital;
65.  $260^{\circ} 46' 30''$ —1050.32 feet along the Southerly side of the new highway to Aiea Naval Hospital to the point of beginning and containing a gross area of 74.468 acres and a net area of 73.923 acres, after excluding and deducting Portion A described as follows: (and as delineated on 14th Naval District Drawing No. OA-N1-490)

Exhibit A—(Continued)

PORTION A

Estate of L. L. McCandless—Owner

Land situated near the Southeast side of Kamehameha Highway approximately 300 feet East of Halawa Bridge at Halawa, Ewa, Oahu, T. H.

Being the Whole of Royal Patent 457, Land Commission Award 2131, Apana 1 to Kanihoalii for Kaukiwaa.

Beginning at the Southwest corner of this parcel of land, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 763.60 feet North and 9583.20 feet West, and running by azimuths measured clockwise from true South:

1.  $164^{\circ} 00'$ —124.00 feet along L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui; [472]
2.  $155^{\circ} 00'$ —186.00 feet along L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui;
3.  $234^{\circ} 00'$ —83.00 feet along L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui;
4.  $338^{\circ} 15'$ —319.00 feet along L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui;
5.  $61^{\circ} 00'$ —83.00 feet along L. C. Aw. 7712 and 8516-B to M. Kekuanaoa and Kamaikui to the point of beginning and containing an area of 0.545 acre, and as delineated on 14th Naval District Drawing No. OA-N1-490.

Portion B is subject to the following easements, said easements being delineated on aforesaid drawing.

Exhibit A—(Continued)

EASEMENTS 1-A and 1-B

The Hawaiian Electric Co., Ltd.'s Easement for  
Transmission Line Fifty (50) Feet Wide

Land situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land  
Commission Award 7712 and 8516-B to M. Kek-  
uanaoa and Kamaikui.

Centerline Description of Easement 1-A.

Beginning on the Southeasterly boundary of Por-  
tion B, and on the centerline of the Hawaiian Elec-  
tric Co., Ltd.'s easement, the coordinates of which  
referred to Government Survey Triangulation Sta-  
tion "Salt Lake" being 1731.59 feet North and  
8216.66 feet West, and running by azimuth measured  
clockwise from true South:

1.  $173^{\circ} 52' 30''$ —142.96 feet. [473]

Centerline Description of Easement 1-B.

Beginning on the Southeasterly boundary of Por-  
tion B, and on the centerline of the Hawaiian Elec-  
tric Co., Ltd.'s easement, the coordinates of which  
referred to Government Survey Triangulation Sta-  
tion "Salt Lake" being 2461.06 feet North and  
8294.92 feet West, and running by azimuth meas-  
ured clockwise from true South:

1.  $173^{\circ} 52' 30''$ —776.24 feet to the Southeasterly  
side of the new highway to Aiea Naval Hospital.

Exhibit A—(Continued)

EASEMENT 4-B

The United States of America Perpetual Easement  
Five (5) Feet Wide Dated May 28, 1940, Re-  
corded in Liber 1581, Page 385, in the Bureau  
of Conveyances at Honolulu.

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land  
Commission Award 7712 and 8516-B to M. Kek-  
uanaoa and Kamaikui.

Centerline Description.

Beginning on the Northerly boundary of Portion  
B, and on the Southerly boundary of the new high-  
way to Aiea Naval Hospital, the coordinates of  
which referred to Government Survey Triangula-  
tion Station "Salt Lake" being 3542.14 feet North  
and 7600.39 feet West, and running by azimuths  
measured clockwise from true South:

1.  $281^{\circ} 16'$ —30.32 feet;
2.  $291^{\circ} 21'$ —99.37 feet; [475]
3.  $296^{\circ} 02'$ —247.82 feet;
4.  $301^{\circ} 27'$ —154.82 feet;
5.  $306^{\circ} 27'$ —133.94 feet;
6.  $313^{\circ} 34'$ —56.76 feet to the Southerly boundary  
of Portion B.

Exhibit A—(Continued)

EASEMENT 5-B

Honolulu Plantation Co.'s Easement for Ditch  
Six (6) Feet Wide

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekua-naoa and Kamaikui.

Centerline Description.

Beginning on the Southerly boundary of Portion B, and on the centerline of the Honolulu Plantation Co.'s easement for ditch six (6) feet wide, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3045.51 feet North and 7462.46 feet West, and running by azimuths measured clockwise from true South:

1. 200° 20'—42.25 feet;
2. 187° 22'—11.85 feet;
3. 183° 31'—363.90 feet;
4. 225° 54'—207.00 feet to the Southerly side of the new highway to Aiea Naval Hospital. [476]

Exhibit "A"—(Continued)

EASEMENT 6

Honolulu Plantation Co.'s Easement Six (6) Feet  
Wide for Underground Pipeline

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land  
Commission Award 7712 and 8516-B to M. Keku-  
anaoa and Kamaikui.

Centerline Description.

Beginning at the Southerly end of this ease-  
ment and on the Southerly boundary of Portion  
B, the coordinates of which referred to Govern-  
ment Survey Triangulation Station "Salt Lake"  
being 3249.52 feet North and 6436.60 feet West,  
and running by azimuths measured clockwise from  
true South:

1.  $176^{\circ} 06'$ —15.00 feet;
2.  $212^{\circ} 20'$ —232.53 feet. Thence on a curve to the  
left, with a radius of 230.00 feet, the chord  
azimuth and distance being:
3.  $192^{\circ} 40'$ —154.81 feet;
4.  $173^{\circ} 00'$ —157.03 feet to the Southerly side of  
the Aiea Naval Hospital Access Road, the true  
azimuth and distance to the end of the 68th  
course of Portion B, Aiea Barracks, being  
 $260^{\circ} 46' 30''$  77.41 feet, and as delineated on  
14th Naval District Drawing No. OA-N1-490.

Exhibit A—(Continued)

EASEMENT 6-A

Honolulu Plantation Co.'s Easement Six (6) Feet  
Wide for Irrigation Ditch Right-of-Way.

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land  
Commission Award 7712 and 8516-B to M. Keku-  
anaoa and Kamaikui.

Centerline Description.

Beginning at the Northwesterly end of this ease-  
ment and on the centerline of Easement 6, the  
true azimuth and distance from the end of Ease-  
ment 6 being  $353^{\circ} 00'$  2.97 feet, and running by  
azimuths measured clockwise from true South:

1.  $260^{\circ} 46' 30''$ —65.00 feet;
2.  $305^{\circ} 27'$ —55.27 feet;
3.  $302^{\circ} 30'$ —140.00 feet;
4.  $298^{\circ} 00'$ —105.00 feet;
5.  $290^{\circ} 26' 30''$ —110.30 feet;
6.  $263^{\circ} 00'$ —10.00 feet;
7.  $208^{\circ} 30'$ —14.00 feet to the Southerly side of  
Moanalua Road, and as delineated on 14th  
Naval District Drawing No. OA-N1-490. [478]

EASEMENT 8-A

Hawaiian Electric Co., Ltd.'s Easement for Trans-  
mission Line Ten (10) Feet Wide

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land  
Commission Award 7712 and 8516-B to M. Kek-  
uanaoa and Kamaikui. [479]

Exhibit A—(Continued)

Centerline Description.

Beginning on the Northeasterly boundary of Portion B, and on the Southwest side of Moanalua Road, on the centerline of the Hawaiian Electric Co., Ltd.'s easement for transmission line ten (10) feet wide, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3723.31 feet North and 6140.09 feet West, and running by azimuths measured clockwise from true South:

1.  $304^{\circ} 25' 30''$ —352.94 feet;
2.  $320^{\circ} 31'$ —3.36 feet to the Southerly boundary of Portion B.

EASEMENT 9-B

Honolulu Plantation Co.'s Easement for Electric Transmission Line Ten (10) Feet Wide

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekunaoa and Kamaikui.

Centerline Description.

Beginning on the Southerly boundary of Portion B, and on the centerline of the Honolulu Plantation Co.'s easement for electric transmission line ten (10) feet wide, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3234.67 feet North and 6741.45 feet West, and running by azimuth measured clockwise from true South:

Exhibit A—(Continued)

1.  $137^{\circ} 55'$ —541.99 feet to the Southerly side of the new highway to Aiea Naval Hospital. [481]

PORTION C

Trustees of B. P. Bishop Estate—Owners

Land Situated on the Northerly side of new highway to Aiea Naval Hospital between Kamehameha Highway and Moanalua Road at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekunaoa and Kamaikui.

Beginning at U.S.M.R. Monument No. 14 at the North corner of this parcel of land, on the boundary of the lands of Aiea and Halawa, and on the Southwest side of Moanalua Road, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 4485.44 feet North and 7212.38 feet West, and running by azimuths measured clockwise from true South:

1.  $305^{\circ} 27'$ —1130.47 feet to a pipe;
2.  $80^{\circ} 46' 30''$ —989.64 feet along the Northwest side of the new highway to Aiea Naval Hospital;
3.  $170^{\circ} 46' 30''$ —5.00 feet along the Northwest side of the new highway to Aiea Naval Hospital;
4.  $80^{\circ} 46' 30''$ —121.70 feet along the Northwest side of the new highway to Aiea Naval Hospital. Thence along the Northwest side of the

Exhibit A—(Continued)

new highway to Aiea Naval Hospital, on a curve to the left, with a radius of 2899.79 feet, the direct azimuth and distance being:

5.  $78^{\circ} 22' 10''$ —243.42 feet; [482]
6.  $345^{\circ} 57' 50''$ —5.00 feet along the Northerly side of the new highway to Aiea Naval Hospital. Thence along the Northwest side of the new highway to Aiea Naval Hospital, on a curve to the left, with a radius of 2894.79 feet, the direct azimuth and distance being:
7.  $74^{\circ} 00' 15''$ —197.99 feet. Thence along the Northwest side of the new highway to Aiea Naval Hospital, on a curve to the left, with a radius of 2894.79 feet, the direct azimuth and distance being:
8.  $67^{\circ} 09' 20''$ —493.41 feet;
9.  $62^{\circ} 16'$ —318.93 feet along the Northwest side of the new highway to Aiea Naval Hospital. Thence along the Northeasterly corner of Kamehameha Highway and the new highway to Aiea Naval Hospital, on a curve to the right, with a radius of 30.00 feet, the direct azimuth and distance being:
10.  $118^{\circ} 55'$ —50.12 feet;
11.  $209^{\circ} 07' 30''$ —279.96 feet along the Southeast side of Kamehameha Highway. Thence along the Southeast side of Kamehameha Highway, on a curve to the left, with a radius of 1120.48 feet, the direct azimuth and distance being:
12.  $203^{\circ} 11' 54''$ —231.39 feet;
13.  $287^{\circ} 16' 18''$ —15.00 feet along the Southeast-

Exhibit A—(Continued)

erly side of Kamehameha Highway. Thence along the Southeast side of Kamehameha Highway, on a curve to the left, with a radius of 1135.48 feet, the direct azimuth and distance being: [483]

14.  $194^{\circ} 45' 27''$ —99.62 feet;
15.  $237^{\circ} 48' 20''$ —1321.31 feet along the land of Aiea to the point of beginning and containing an area of 25.038 acres, and as delineated on the 14th Naval District Drawing No. OA-N1-490.

Subject to the following easements, said easements being delineated on aforesaid drawing.

EASEMENT 1-C

The Hawaiian Electric Co., Ltd.'s Easement for  
Transmission Line Fifty (50) Feet Wide

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekua-naoa and Kamaikui.

Centerline Description.

Beginning on the Southerly boundary of Portion C, and on the Northerly side of the new highway to Aiea Naval Hospital, and on the centerline of the Hawaiian Electric Co., Ltd.'s easement for transmission line fifty (50) feet wide, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3297.04

Exhibit A—(Continued)

feet North and 8384.62 feet West, and running by azimuth measured clockwise from true South:

1.  $173^{\circ} 52' 30''$ —276.63 feet to the Easterly side of Kamehameha Highway. [484]

EASEMENT 2

Oahu Railway and Land Co.'s and Honolulu Plantation Co.'s Easement for Railroad Sixteen (16) Feet Wide

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekua-naoa and Kamaikui.

Centerline Descriptions.

Beginning on the Westerly boundary of Portion C, and at the Easterly corner of the new highway to Aiea Naval Hospital and Kamehameha Highway, and on the centerline of the Oahu Railway and Land Co.'s and Honolulu Plantation Co.'s easement for railroad sixteen (16) feet wide, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3206.39 feet North and 8577.60 feet West, and running by azimuths measured clockwise from true South:

1.  $242^{\circ} 20'$ —452.63 feet. Thence on a curve to the left, with a radius of 722.79 feet, the direct azimuth and distance being:
2.  $218^{\circ} 18' 30''$ —588.55 feet;
3.  $194^{\circ} 17'$ —282.18 feet to the Halawa-Aiea bound-

Exhibit A—(Continued)

ary, being also the Northwest boundary of  
Portion C. [485]

Centerline Description of Siding.

Beginning on the centerline of the above described easement, the coordinates of which referred to Government Survey Tringulation Station "Salt Lake" being 3778.39 feet North and 7845.28 feet West, and running by azimuths measured clockwise from true South:

On a curve to the left, with a radius of 161.40 feet, the direct azimuth and distance being:

1. 209° 04' 50"—64.29 feet.

Thence on a curve to the left, with a radius of 733.56 feet, the direct azimuth and distance being:

2. 195° 57' 46"—43.00 feet;
3. 194° 17'—292.71 feet to the Halawa-Aiea boundary, being also the Northwest boundary of Portion C.

EASEMENT 4-A

The United States of America Perpetual Easement  
Five (5) Feet Wide Dated May 28, 1940, Recorded in Liber 1581, Page 395, in the Bureau of Conveyances at Honolulu.

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekua-naoa and Kamaikui.

Exhibit A—(Continued)

Centerline Description.

Beginning on the Halawa-Aiea boundary, on the Northwest boundary of Portion C, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3870.67 feet North and 8188.87 feet West, and running by azimuths measured clockwise from true South:

1. 339° 42'—102.13 feet; [487]
2. 338° 32'—182.96 feet;
3. 337° 23'—126.71 feet;
4. 250° 51'—77.55 feet;
5. 254° 44'—115.67 feet;
6. 262° 50'—36.41 feet to the Northerly side of the new highway to Aiea Naval Hospital.

EASEMENT 5-A

Honolulu Plantation Co.'s Easement for Ditch Six  
(6) Feet Wide

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekua-haoa and Kamaikui.

Centerline Description.

Beginning on the Southerly boundary of Portion C, and on the Northerly side of the new highway to Aiea Naval Hospital, and on the centerline of the Honolulu Plantation Co.'s easement for ditch six (6) feet wide, the coordinates of which referred to Government Survey Triangulation Sta-

Exhibit A—(Continued)

tion "Salt Lake" being 3683.26 feet North and 7193.66 feet West, and running by azimuths measured clockwise from true South:

1. 225° 54'—579.52 feet;
2. 305° 01'—134.00 feet;
3. 268° 30'—7.00 feet;
4. 228° 44'—66.25 feet; [488]
5. 305° 27'—346.40 feet;
6. 336° 32'—22.18 feet to the Northerly side of the new highway to Aiea Naval Hospital, being also the Southern boundary of Portion C.

EASEMENT 9-A

Honolulu Plantation Co.'s Easement for Electric Transmission Line Ten (10) Feet Wide

Land Situated at Halawa, Ewa, Oahu, T. H. Being a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekuanaoa and Kamaikui.

Centerline Description:

Beginning on the Southerly boundary of Portion B, on the Northerly side of the new highway to Aiea Naval Hospital, and on the centerline of the Honolulu Plantation Co.'s easement for electric transmission line ten (10) feet wide, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3689.93 feet North and 7152.58 feet West, and running by azimuths measured clockwise from true South:

Exhibit A—(Continued)

1. 137° 55'—298.25 feet;
2. 120° 52'—461.30 feet to the Halawa-Aiea boundary, being also the Northwest boundary of Portion C. [490]

AIEA BARRACKS

2ND ADDITIONAL AND 3RD ADDITIONAL

Land Situated at Halawa and Aiea, Ewa,  
Oahu, T. H.

Descriptions of:

Aiea Barracks 2nd Additional. Apparent owner: B. P. Bishop Estate; area, 26.195 acres.

Aiea Barracks 3rd Additional (Honolulu Plantation Co. Land). Apparent owner: Honolulu Plantation Co.; area, 2.732 acres.

Aiea Barracks 3rd Additional (B. P. Bishop Estate Land). Apparent owner: B. P. Bishop Estate; area, 1.716 acres. [491]

AIEA BARRACKS 2ND ADDITIONAL

Land Situated on the North Side of Aiea Naval Hospital Road and East of Aiea Barracks 1st Additional at Halawa, Ewa, Oahu, T. H.

Being a Portion of the Ahupuaa of Halawa and Being Also a Portion of Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekuanaoa and Kamaikui.

Beginning at a pipe at the Southwest corner of this parcel of land, on the North side of Aiea

## Exhibit A—(Continued)

Naval Hospital Road, and being also the Southeast corner of Aiea Barracks 1st Additional, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 3,889.15 feet North and 5,925.85 feet West, and running by azimuths measured clockwise from true South:

1. 222° 27'—443.40 feet along Aiea Barracks 1st Additional, being also along a remainder of the land of Halawa, to a pipe;
2. 141° 55'—598.40 feet along Aiea Barracks 1st Additional, being also along a remainder of the land of Halawa, to a pipe;
3. 134° 50'—84.65 feet along Aiea Barracks 1st Additional, being also along a remainder of the land of Halawa, to a pipe;
4. 131° 30' 30"—213.00 feet along Aiea Barracks 1st Additional, being also along a remainder of the land of Halawa, to a pipe;
5. 126° 33'—204.40 feet along Aiea Barracks 1st Additional, being also along a [492] remainder of the land of Halawa, to a pipe;
6. 237° 47' 30"—318.67 feet along U. S. Naval Reservation to a pipe;
7. 295° 12'—118.10 feet along a remainder of the land of Halawa to a pipe;
8. 285° 14'—96.50 feet along a remainder of the land of Halawa to a pipe;
9. 279° 02'—110.20 feet along a remainder of the land of Halawa to a pipe;
10. 300° 22'—167.40 feet along a remainder of the land of Halawa to a pipe;

Exhibit A—(Continued)

11.  $236^{\circ} 42'$ —71.10 feet along a remainder of the land of Halawa to a pipe;
12.  $302^{\circ} 06'$ —78.30 feet along a remainder of the land of Halawa to a pipe;
13.  $294^{\circ} 24'$ —46.40 feet along a remainder of the land of Halawa to a pipe;
14.  $280^{\circ} 48'$ —69.50 feet along a remainder of the land of Halawa to a pipe;
15.  $268^{\circ} 39' 30''$ —191.23 feet along a remainder of the land of Halawa to a pipe;
16.  $289^{\circ} 57' 30''$ —193.83 feet along a remainder of the land of Halawa to a pipe; thence along a remainder of the land of Halawa, on a curve to the right, with a radius of 460.00 feet, the chord azimuth and distance being,
17.  $314^{\circ} 05' 45''$ —376.21 feet;
18.  $338^{\circ} 14'$ —529.30 feet along a remainder of the land of Halawa to the Northerly side of Aiea Naval Hospital Road; thence along the Northerly side of Aiea Naval Hospital Road, on a curve to the left, with a radius of 5759.58 feet, the chord azimuth and distance being,
19.  $83^{\circ} 24' 18''$ —328.35 feet to a pipe; [493]
20.  $171^{\circ} 46' 18''$ —15.00 feet along the East side of Aiea Naval Hospital Road to a pipe; thence along the North side of Aiea Naval Hospital Road, on a curve to the left, with a radius of 5774.58 feet, the chord azimuth and distance being,
21.  $81^{\circ} 16' 24''$ —100.45 feet to a pipe;

Exhibit A—(Continued)

22. 80° 46' 30"—700.31 feet along the North side of Aiea Naval Hospital Road to a pipe;
23. 350° 46' 30"—15.00 feet along the West side of Aiea Naval Hospital Road to a pipe;
24. 80° 46' 30"—240.73 feet along the North side of Aiea Naval Hospital Road to the point of beginning and containing an area of 26.195 acres, and as delineated on the 14th Naval District Drawing No. OA-N1-1076.

Subject to Easements A-4, A-5 and B hereinafter described, said easements being delineated on the aforesaid drawing. [494]

AI EA BARRACKS 3RD ADDITIONAL  
(Honolulu Plantation Co. Land)

Land Situated at Aiea, Ewa, Oahu, T. H.

Being Land Quitclaimed by the United States of America to Waialua Agricultural Co., Ltd., by Deed Dated January 26, 1929 and Recorded in the Bureau of Conveyances at Honolulu in Liber 1000, Page 14, and Being Also the Land Conveyed by Waialua Agricultural Co., Ltd., to Honolulu Plantation Co. by Deed Dated January 29, 1929 and Recorded in the Bureau of Conveyances at Honolulu in Liber 1002, Page 91.

Beginning at a pipe at the South corner of this parcel of land, on the Northeast side of Moanalua Road, being also the West corner of Parcel T-1 (government road 30 feet wide), the coordinates of

Exhibit A—(Continued)

which referred to Government Survey Triangulation Station "Salt Lake" being 4,551.82 feet North and 7,219.78 feet West, and running by azimuths measured clockwise from true South:

1.  $125^{\circ} 15' 10''$ —238.28 feet along the Northeast side of Moanalua Road to the Southerly side of Oahu Railway and Land Company's railroad right-of-way; thence along the Southerly side of Oahu Railway and Land Company's railroad right-of-way, on a curve to the right, with a radius of 935.40 feet, the chord azimuth and distance being,
2.  $241^{\circ} 21' 50''$ —397.03 feet;
3.  $253^{\circ} 37'$ —203.85 feet along the Southerly side of Oahu Railway and Land Company's railroad right-of-way; [495] thence along the Southerly side of Oahu Railway and Land Company's railroad right-of-way, on a curve to the left, with a radius of 657.30 feet, the chord azimuth and distance being,
4.  $250^{\circ} 44' 47''$ —65.83 feet;
5.  $330^{\circ} 24'$ —125.45 feet along Aiea Barracks 3rd Additional (B. P. Bishop Estate Land), being also along Grant 10197 to B. P. Bishop Estate;
6.  $57^{\circ} 49' 30''$ —559.49 feet along Parcel T-1 (government road 30 feet wide) to the point of beginning and containing an area of 2.732 acres, and as delineated on 14th Naval District Drawing No. OA-N1-1076. [496]

Exhibit A—(Continued)

AIEA BARRACKS 3RD ADDITIONAL  
(B. P. Bishop Estate Land)

Land Situated at Aiea, Ewa, Oahu, T. H.

Being a Portion of Grant 10197 to B. P. Bishop Estate.

Beginning at the South corner of this parcel of land, on the Northwest boundary of Parcel T-1 (government road 30 feet wide), being also the East corner of Aiea Barracks 3rd Additional (Honolulu Plantation Company Land), the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 4,849.76 feet North and 6,746.21 feet West, and running by azimuths measured clockwise from true South:

1.  $150^{\circ} 24'$ —125.45 feet along Aiea Barracks 3rd Additional (Honolulu Plantation Company Land) to the Southerly side of Oahu Railway and Land Company's railroad right-of-way; thence along the Southerly side of Oahu Railway and Land Company's railroad right-of-way, on a curve to the left, with a radius of 657.30 feet, the chord azimuth and distance being,
2.  $239^{\circ} 56' 17''$ —181.54 feet;
3.  $232^{\circ} 00'$ —174.15 feet along a remainder of Grant 10197 to B. P. Bishop Estate; thence along a remainder of Grant 10197 to B. P. Bishop Estate, on a curve to the right, with

Exhibit A—(Continued)

a radius of 343.17 feet, the chord azimuth and distance being,

4. 257° 57'—300.33 feet; [497] thence along a remainder of Grant 10197 to B. P. Bishop Estate, on a curve to the left, with a radius of 613.14 feet, the chord azimuth and distance being,
5. 306° 31' 06"—34.99 feet to the Northwest side of government road 30 feet wide;
6. 57° 47' 30"—655.00 feet along government road 30 feet wide and along Parcel T-1 to the point of beginning and containing an area of 1.716 acres, and as delineated on 14th Naval District Drawing No. OA-N1-1076.

Subject to Easement A-1 hereinafter described, said easement being delineated on the aforesaid drawing. [498]

EASEMENT A-1

Description of Centerline of Irrigation Pipeline Right-of-Way for Honolulu Plantation Co.

Beginning at the Northwest end of this easement, on the Northwesterly boundary of Aiea Barracks 3rd Additional (B. P. Bishop Estate Land), the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 5,177.52 feet North and 6,484.50 feet West, and running by azimuths measured clockwise from true South:

## Exhibit A—(Continued)

1.  $320^{\circ} 53'$ —69.87 feet;
2.  $324^{\circ} 40' 30''$ —68.59 feet to the Southeast boundary of Aiea Barracks 3rd Additional (B. P. Bishop Estate Land), the true azimuth and distance to the initial point of Aiea Barracks 3rd Additional (B. P. Bishop Estate Land), being  $57^{\circ} 47' 30''$  408.27 feet, and as delineated on 14th Naval District Drawing No. OA-N1-1076. [499]

## EASEMENT A-4

Description of Centerline of Irrigation Pipeline  
Right-of-Way for Honolulu Plantation Co.

Beginning at the West end of this easement, on the Northwest boundary of Aiea Barracks 2nd Additional, and on the Southeast side of U. S. Naval Reservation 30 feet wide, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 5,018.33 feet North and 6,366.02 feet West, and running by azimuths measured clockwise from true South:

1.  $279^{\circ} 32'$ —136.29 feet;
2.  $305^{\circ} 29'$ —685.71 feet;
3.  $299^{\circ} 41' 30''$ —455.79 feet;
4.  $313^{\circ} 19'$ —257.21 feet;
5.  $342^{\circ} 34'$ —61.31 feet;
6.  $291^{\circ} 18' 30''$ —184.28 feet to the end of the 20th course of Aiea Barracks 2nd Additional and as delineated on 14th Naval District Drawing No. OA-N1-1076.

Exhibit A—(Continued)

EASEMENT A-5

Description of Centerline of Irrigation Ditch  
Right-of-Way for Honolulu Plantation Co.

Beginning at the North end of this easement, on the Northerly boundary of Aiea Barracks 2nd Additional, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 5,097.84 feet North and 5,870.32 feet West, and running by azimuths measured clockwise from true South:

1.  $17^{\circ} 17'$ —42.41 feet;
2.  $34^{\circ} 54'$ —200.00 feet;
3.  $8^{\circ} 29'$ —59.00 feet to the centerline of Easement A-4.
4.  $40^{\circ} 06'$ —98.81 feet to the Westerly boundary of Aiea Barracks 2nd Additional, the true azimuth and distance to the end of the 4th course of Aiea Barracks 2nd Additional being  $131^{\circ} 30' 30''$  194.33 feet, and as delineated on the 14th Naval District Drawing No. OA-N1-1076.

EASEMENT B

Description of Centerline of Irrigation Ditch for  
Honolulu Plantation Co.

Beginning at the North end of this easement, on the Easterly boundary of Aiea Barracks 2nd Ad-

## Exhibit A—(Continued)

ditional, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 4,615.57 feet North and 4,781.82 feet West, and running by azimuths measured clockwise from true South:

1.  $12^{\circ} 31' 30''$ —71.99 feet;
2.  $360^{\circ} 00'$ —70.00 feet;
3.  $336^{\circ} 30'$ —60.00 feet;
4.  $345^{\circ} 00'$ —160.00 feet;
5.  $319^{\circ} 00'$ —45.00 feet;
6.  $337^{\circ} 00'$ —50.00 feet;
7.  $18^{\circ} 00'$ —60.00 feet;
8.  $338^{\circ} 30'$ —50.00 feet to the Southerly boundary of [502] Aiea Barracks 2nd Additional, the true azimuth and distance to the end of the 18th course of Aiea Barracks 2nd Additional being  $264^{\circ} 28' 53''$  112.00 feet, and as delineated on 14th Naval District Drawing No. OA-N1-1076.

## DESCRIPTION OF 15.076 ACRES OF LAND

Situated at the North Corner of Moanalua Road and Aiea Naval Hospital Road at Halawa, Ewa, Oahu, T. H. [504]

## B. P. BISHOP ESTATE, OWNER

Land Situated at the North Corner of Moanalua Road and Aiea Naval Hospital Road at Halawa, Ewa, Oahu, T. H.

Being a Portion of the Ahupuaa of Halawa and Being a Portion of Royal Patent 6717, Land

Exhibit A—(Continued)

Commission Award 7712 and 8516-B to M. Kekuanaoa and Kanaikui.

Beginning at a “†” on concrete at the West corner of this parcel of land, being also the South corner of the Aiea School Lot, and on the Northeast side of Moanalua Road, the coordinates of which referred to Government Survey Triangulation Station “Salt Lake” being 4166.08 feet North and 6677.62 feet West, and running by azimuths measured clockwise from true South:

1.  $215^{\circ} 27'$ —626.34 feet along remainder of the land of Halawa along Aiea School Lot to a pipe;
2.  $125^{\circ} 27'$ —342.65 feet along remainder of the land of Halawa along Aiea School Lot to a pipe;
3.  $237^{\circ} 47' 30''$ —253.00 feet along U. S. Naval Reservation 30-foot right-of-way along the Aiea-Halawa boundary to a pipe;
4.  $306^{\circ} 33'$ —204.40 feet along remainder of the land of Halawa to a pipe;
5.  $311^{\circ} 30' 30''$ —213.00 feet along remainder of the land of Halawa to a pipe;
6.  $314^{\circ} 50'$ —84.65 feet along remainder of the land of Halawa to a pipe; [505]
7.  $321^{\circ} 55'$ —598.40 feet along remainder of the land of Halawa to a pipe;
8.  $42^{\circ} 27'$ —443.40 feet along remainder of the land of Halawa to the North side of the Aiea Naval Hospital Road to a pipe;
9.  $80^{\circ} 46' 30''$ —299.30 feet along the North side

Exhibit A—(Continued)

of the Aiea Naval Hospital Road to a pipe;  
10.  $125^{\circ} 27'$ —560.19 feet along the Northeast side of Moanalua Road to the point of beginning and containing an area of 15.076 acres, and as delineated on the 14th Naval District Drawing No. OA-N1-626.

Subject to the Following Easements, said easements being delineated on the aforesaid drawing.

EASEMENT A-6

Easement Ten (10) Feet Wide for  
Underground Pipeline.

Being a Strip of Land Ten (10) Feet Wide Extending Five (5) Feet on Each Side of the Following Described Centerline:

Beginning at the Southwest end of this easement and on the Northeast side of Moanalua Road, the coordinates of which referred to Government Survey Triangulation Station "Salt Lake" being 4075.60 feet North and 6550.54 feet West, and running by azimuths measured clockwise from true South:

1.  $213^{\circ} 53' 30''$ —179.08 feet;
2.  $215^{\circ} 27'$ —656.90 feet to the Northeasterly boundary of Aiea Barracks 1st Additional, the true azimuth and distance to the end of the 5th course being  $311^{\circ} 30' 30''$  18.67 feet, and as delineated on 14th Naval District Drawing No. OA-N1-626. [506]

Exhibit A—(Continued)

EASEMENT A-7

Easement Ten (10) Feet Wide for  
Underground Pipeline.

Being a Portion of Land Ten (10) Feet Wide  
Extending Five (5) Feet on Each Side of the  
Following Described Centerline:

Beginning at the Westerly end of this ease-  
ment and on the centerline of Easement A-6, the  
true azimuth and distance from the initial point  
of Easement A-6 being  $213^{\circ} 53' 30''$  10.00 feet,  
and running by an azimuth measured clockwise  
from true South:

1.  $305^{\circ} 27'$ —414.58 feet to the Southerly boun-  
dary of Aiea Barracks 1st Additional, the  
true azimuth and distance to the end of the  
9th course of Aiea Barracks 1st Additional  
being  $80^{\circ} 46' 30''$  14.23 feet, and as delineated  
on 14th Naval District Drawing No. OA-N1-  
626.

.....,

Registered Professional Surveyor, Certificate No.  
151.

Honolulu, T. H., April 9, 1945. [507]

[Endorsed]: Filed Aug. 27, 1945.

[463]

[Title of District Court and Cause No. 535.]

MOTION FOR ORDER AMENDING  
PETITION IN CONDEMNATION

Now comes the Petitioner, United States of America, by its Attorney, Charles F. Rathbun, Special Assistant to the Attorney General, and moves that an order be entered amending the Petition in Condemnation herein by striking from Paragraph I in said Petition in the 14th, 15th, 16th and 17th lines of said Paragraph the words and figures;

“ “A1”, “A2” and “A3”, hereto annexed and made parts hereof as though set forth at length and shown upon maps marked Exhibits “B-1”, “B-2” and “B-3”, also attached hereto.”

and substituting therefor after the word “Exhibits” in the 14th line of said paragraph: [510]

“ “A” hereto attached and made a part hereof as though set forth at length and shown upon maps marked Exhibits “B-1”, “B-2” and “B-3” also attached hereto”;

Also by striking from said petition Exhibits “A-1”, “A-2” and “A-3” as attached thereto and Exhibits “B-1”, “B-2” and “B-3” as attached thereto and substituting for said exhibits thus stricken Exhibits “A” and Exhibits “B-1”, “B-2” and “B-3” as attached to this motion and making said Exhibits “A”, “B-1”, “B-2” and “B-3” a part of said Petition as though set forth at length therein;

And also by striking from said Petition the whole of Paragraph III therein and substituting for said Paragraph III a new Paragraph III as follows:

“That the estate sought to be condemned in this action is in fee simple subject, however, to the following rights and reservations:

1. As to Portion B of the lands described in Exhibit “A”, and delineated on Exhibit “B-1” subject to:

A. The existing right of the Hawaiian Electric Company, Limited, its successors and assigns, to operate, maintain, and repair, electric power transmission poles and wire lines, together with the right of ingress and egress for such purposes, over the rights of way, the centerlines of which are delineated on Exhibit “B-1”, attached hereto, as Easements 1-A, 1-B, and 8-A; said right having been acquired by the said Hawaiian Electric Company, Limited, from the Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, by (1) unrecorded lease No. 5877, dated December 1, 1937, [511] expiring January 1, 1966, and (2) by that certain lease agreement No. 7117, from the Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, dated July 1, 1943, expiring December 31, 1965, and recorded in the Bureau of Conveyances of the Territory of Hawaii in Liber 1787, at Page 259.

B. The right hereby reserved unto George Miles Collins, John Kirkwood Clarke, Frank Elbert Midkiff, Edwin Paulhaulani Murray and Joseph Boyd Poindexter, as Trustees under the Will and of the

Estate of Bernice P. Bishop, Deceased, and to their successors in trust, assigns and lessees, to operate, maintain, and repair the following facilities for plantation purposes, together with the right of ingress and egress for such purposes, for so long only as the rights of way over which said facilities pass are used for such purposes:

(a) Electric power transmission poles and wire lines over the right of way, the centerline of which is described in and delineated on Exhibits "A" and "B-1", attached hereto as Easement 9-B;

(b) Irrigation ditches over and along the rights of way the centerlines of which are described in, and delineated on Exhibits "A" and "B-1", attached hereto as Easements 5-B and 6-A;

(c) A pipeline under and along the right of way, the centerline of which is described in, and delineated on Exhibits "A" and "B-1", attached hereto as Easement 6;

2. As to Portion C of the lands described in Exhibit "A", and delineated on Exhibit "B-1" subject to;

A. The existing right of the Hawaiian Electric Company, Limited, its successors and assigns, to operate, maintain, and repair, electric power transmission poles and wire lines, together [512] with the right of ingress and egress for such purposes, over the right of way, the centerline of which is described in Exhibit "A" and delineated on Exhibit "B-1", attached hereto as Easement 1-C; said right having been acquired by the said Hawaiian Electric Company, Limited, from the

Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, by unrecorded lease No. 5877, dated December 1, 1937, expiring January 1, 1966.

B. The right hereby reserved unto George Miles Collins, John Kirkwood Clarke, Frank Elbert Midkiff, Edwin Pauhaulani Murray and Joseph Boyd Poindexter, as Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, and to their successors in trust, assigns and lessees, to operate, maintain, and repair the following facilities for plantation purposes, together with the right of ingress and egress for such purposes, for so long only as the rights of way over which said facilities pass are used for such purposes:

(a) Electric power transmission poles and wire lines over the right of way, the centerline of which is described in and delineated on Exhibits "A" and "B-1", attached hereto as Easement 9-A;

(b) Railway tracks and facilities, including the operation of locomotives and cars over the same over the centerline described in and delineated on Exhibits "A" and "B-1", attached hereto as Easement 2;

(c) A pipeline under and along the centerline of the right of way described in and delineated on Exhibits "A" and "B-1", attached hereto as Easement 5-A;

3. As to the lands described in Exhibit "A" and delineated on Exhibit "B-2" as "Aiea Barracks 1st Additional," subject to: [513]

A. The right hereby reserved unto George Miles

Collins, John Kirkwood Clarke, Frank Elbert Midkiff, Edwin Pauhaulani Murray and Joseph Boyd Poindexter, as Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, and to their successors in trust, assigns and lessees, to operate, maintain, and repair the following facilities for plantation purposes, together with the right of ingress and egress for such purposes, for so long only as the rights of way over which said facilities pass are used for such purposes:

(a) Pipelines under and along the centerlines of the rights of way described in and designated on Exhibits "A" and "B-2", attached hereto as Easements A-6 and A-7.

4. As to the lands described in Exhibit "A" and delineated on Exhibit "B-3" as "Aiea Barracks 2nd and 3rd Additional" subject to:

A. The right hereby reserved unto George Miles Collins, John Kirkwood Clarke, Frank Elbert Midkiff, Edwin Pauhaulani Murray and Joseph Boyd Poindexter, as Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, and to their successors in trust, assigns and lessees, to operate, maintain and repair the following facilities for plantation purposes, together with the right of ingress and egress for such purposes, for so long as the rights of way over which said facilities pass are used for such purposes:

(a) Irrigation ditches over and along the centerline of the rights of way described in and delineated on Exhibits "A" and "B-3" attached hereto as Easements B and A-5;

(b) Pipelines under and along the centerline of the right of way described in and designated on Exhibits "A" and "B-3" attached hereto as Easements A-1 and A-4." [514]

Petitioner states that it is necessary that the petition herein be amended to more accurately define the estate being taken.

Dated Honolulu, T. H., this 27th day of August, 1945.

UNITED STATES  
OF AMERICA,

By /s/ CHARLES F. RATHBUN,  
Special Asst. to the Atty. Gen.

[Printer's Note]: Exhibit "A" is the same as Exhibit "A" set out at pages 281-1a - 281-36a.

[Endorsed]: Filed Aug. 27, 1945.

[515]

[Title of District Court and Cause No. 535.]

ORDER AMENDING PETITION  
IN CONDEMNATION

Now this 27th day of August, 1945, upon motion by the Petitioner, United States of America, by its Attorney, Charles F. Rathbun, Special Assistant to the Attorney General, it appearing that it is necessary to more accurately define the estate being taken herein by amending the Petition in the above cause,

It Is Ordered:

That the Petition in Condemnation herein be amended by striking from Paragraph I in said Petition in the 14th, 15th, 16th and 17th lines of said Paragraph the words and figures:

“ “A-1”, “A-2” and “A-3”, hereto annexed and made parts hereof as though set forth at length and shown upon maps marked Exhibits “B-1”, “B-2” and “B-3”. also attached hereto.”

and substituting therefore after the word “Exhibits” in the 14th line of said paragraph. [563]

“ “A” hereto attached and made a part hereof as though set forth at length and shown upon maps marked Exhibits “B-1”, “B-2” and “B-3” also attached hereto”:

Also by striking from said petition Exhibits “A-1”, “A-2” and “A-3” as attached thereto and Exhibits “B-1”, “B-2” and “B-3” as attached thereto and substituting for said exhibits thus

stricken Exhibits "A" and Exhibits "B-1", "B-2" and "B-3" as attached to the Motion for an Order amending Petition and making said Exhibits "A", "B-1", "B-2" and "B-3" a part of said Petition as though set forth at length therein;

Also by striking from said Petition the whole of Paragraph III therein and substituting for said Paragraph III a new Paragraph III as follows:

"That the estate sought to be condemned in this action is in fee simple subject, however, to the following rights and reservations:

1. As to Portion B of the lands described in Exhibit "A", and delineated on Exhibit "B-1" subject to:

A. The existing right of the Hawaiian Electric Company, Limited, its successors and assigns, to operate, maintain, and repair, electric power transmission poles and wire lines, together with the right of ingress and egress for such purposes, over the rights of way, the centerlines of which are described in Exhibit "A" and delineated on Exhibit "B-1", attached hereto, as Easements 1-A, 1-B and 8-A; said right having been acquired by the said Hawaiian Electric Company, Limited, from the Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, by (1) unrecorded lease No. 5877, dated December 1, 1937, [564] expiring January 1, 1966, and (2) by that certain lease agreement No. 7117, from the Trustees under the Will and of the Estate of Bernice P. Bishop, deceased, dated July 1, 1943, expiring December 31, 1965, and recorded in the Bureau of Conveyances

of the Territory of Hawaii in Liber 1787, at Page 259.

B. The Right hereby reserved unto George Miles Collins, John Kirkwood Clarke, Frank Elbert Midkiff, Edwin Pauhaulani Murray and Joseph Boyd Poindexter, as Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, and to their successors in trust, assigns and lessees, to operate, maintain, and repair the following facilities for plantation purposes, together with the right of ingress and egress for such purposes, for so long only as the rights of way over which said facilities pass are used for such purposes;

(a) Electric power transmission poles and wire lines over the right of way, the centerline of which is described in and delineated on Exhibits "A" and "B-1", attached hereto as **Easement 9-B**;

(b) Irrigation ditches over and along the rights of way, the centerlines of which are described in, and delineated on Exhibits "A" and "B-1", attached hereto as **Easements 5-B and 6-A**;

(c) A pipeline under and along the right of way, the centerline of which is described in, and delineated on Exhibits "A" and "B-1", attached hereto as **Easement 6**;

2. As to Portion C of the lands described in Exhibit "A", and delineated on Exhibits "B-1", subject to;

A. The existing right of the Hawaiian Electric Company, Limited, its successors and assigns, to operate, maintain, and repair, electric power transmission poles and wire lines, together [565] with

the right of ingress and egress for such purposes, over the right of way, the centerline of which is described in Exhibit "A" and delineated on Exhibit "B-1", attached hereto as Easement 1-C; said right having been acquired by the said Hawaiian Electric Company, Limited, from the Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, by unrecorded Lease No. 5877, dated December 1, 1937, expiring January 1, 1966.

B. The right hereby reserved unto George Miles Collins, John Kirkwood Clarke, Frank Elbert Midkiff, Edwin Pauhaulani Murray and Joseph Boyd Poindexter, as Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, and to their successors in trust, assigns and lessees, to operate, maintain, and repair the following facilities for plantation purposes, together with the right of ingress and egress for such purposes, for so long only as the rights of way over which said facilities pass are used for such purposes:

(a) Electric power transmission poles and wire lines over the right of way, the centerline of which is described in and delineated on Exhibits "A" and "B-1", attached hereto as Easement 9-A:

(b) Railway tracks and facilities, including the operation of locomotives and cars over the same over the centerline described in and delineated on Exhibits "A" and "B-1", attached hereto as Easement 2;

(c) A pipeline under and along the centerline of the right of way described in and delineated

on Exhibits "A" and "B-1", attached hereto as Easement 5-A;

3. As to the lands described in Exhibit "A" and delineated on Exhibit "B-2" as "Aiea Barracks 1st Additional," subject to: [566]

A. The right hereby reserved unto George Miles Collins, John Kirkwood Clarke, Frank Elbert Midkiff, Edwin Pauhaulani Murray and Joseph Boyd Poindexter, as Trustees under the Will and of the Estate of Bernice P. Bishop, deceased, and to their successors in trust, assigns and lessees, to operate, maintain, and repair the following facilities for plantation purposes, together with the right of ingress and egress for such purposes, for so long only as the rights of way over which said facilities pass are used for such purposes:

(a) Pipelines under and along the centerlines of the rights of way described in and designated on Exhibits "A" and "B-2", attached hereto as Easements A-6 and A-7.

4. As to the lands described in Exhibit "A" and delineated on Exhibit "B-3" as "Aiea Barracks 2nd and 3rd Additional" subject to:

A. The right hereby reserved unto George Miles Collins, John Kirkwood Clarke, Frank Elbert Midkiff, Edwin Pauhaulani Murray and Joseph Boyd Poindexter, as Trustees under the Will and of the Estate of Bernice P. Bishop, deceased, and to their successors in trust, assigns and lessees, to operate, maintain, and repair the following facilities for plantation purposes, together with the right of ingress and egress for such purposes, for so long only

as the rights of way over which said facilities pass are used for such purposes;

(a) Irrigation ditches over and along the centerlines of the rights of way described in and delineated on Exhibits "A" and "B-3" attached hereto as Easements B and A-5;

(b) Pipelines under and along the centerline of the right of way described in and designated on Exhibits "A" and "B-3" attached hereto as Easements A-1 and A-4."

Dated Honolulu, T. H., this 27th day of August, 1945.

/s/ D. E. METZGER,

Judge of the United States District Court for the District of Hawaii.

[Endorsed]: Filed Aug. 27, 1945.

[567]

In the District Court of the United States  
For the District of Hawaii

April Term 1945

Civil No. 535

UNITED STATES OF AMERICA,

Petitioner,

vs.

145.225 ACRES OF LAND, more or less, situate  
at Halawa and Aiea, Ewa, Island of Oahu,  
Territory of Hawaii; George Miles Collins, John  
Kirkwood Clarke, Frank Elbert Midkiff, Ed-  
win Pauhaulani Murray and Joseph Boyd Poin-  
dexter, Trustees under the Will and of the  
Estate of Bernice P. Bishop, et al.,

Defendants.

## ORDER AND JUDGMENT ON DECLARATION OF TAKING

It appearing that on October 11, 1944, the United States of America filed a Petition in Condemnation of certain land described and shown on the exhibits attached to said petition and now attached to the petition herein as amended; and,

It further appearing that a Declaration of Taking was this day filed herein, being signed by John L. Sullivan, Acting Secretary of the Navy, and that said Declaration of Taking was filed under and pursuant to provisions of the Act of Congress approved March 27, 1942 (Public Law 507—77th Congress), the Act of Congress approved June 28,

1946 (Public Law 92—78th Congress), the Act of Congress approved January 28, 1944 (Public Law 224—78th Congress), and the Act of Congress of February 26, 1931 (46 Stat. 1421), declaring taken the lands described in said Declaration of Taking to the extent shown in said Declaration of Taking and in the exhibits attached thereto. That the uses of said lands are [568] those described in the Declaration of Taking and in the Petition filed herein as amended; and that the said Declaration of Taking sets forth the estimate of just compensation made pursuant to law and that contemporaneously with the filing of said Declaration of Taking, there was deposited in the Registry of this Court for the use and benefit of the persons entitled thereto the sum of Seventy One Thousand, Four Hundred Fifty Eight Dollars, (\$71,458.00).

It Is Therefore Ordered, Adjudged and Decreed that by virtue of the filing of said Declaration of Taking and the deposit of said money, full fee simple title to the lands described and shown on Exhibits "A", "B-1", "B-2" and "B-3" attached to the said Declaration of Taking herein, be and it is hereby indefeasibly vested in the United States of America, subject to the reservations set forth in said Declaration of Taking and exhibits attached thereto.

It Is Further Ordered that a copy of this Order be promptly served by the United States Marshal upon each of the defendants in this cause. The Marshal is further ordered to post a copy hereof

in a conspicuous place on the premises and to forthwith make due return of his said service to this Court.

Dated Honolulu, T. H., this 27th day of August, 1945.

/s/ D. E. METZGER,  
Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed Aug. 27, 1945.

[569]

In the District Court of the United States  
for the District of Hawaii

October Term 1944

Civil No. 536

UNITED STATES OF AMERICA,

Petitioner,

vs.

26.922 acres of land, more or less, situate at Waiawa, Waimalu, Ewa, Island of Oahu, Territory of Hawaii; FRANCIS H. I. BROWN; EDITH AUSTIN; MABEL FRAZAR AUSTIN, LINDSLEY AUSTIN and BOSTON SAFE DEPOSIT AND TRUST COMPANY, a corporation, Trustees under the Will and of the Estate of Walter Austin, deceased; HONOLULU PLANTATION COMPANY, a California corporation; HAWAIIAN TRUST COMPANY, LIMITED, an Hawaiian corporation; OAHU RAILWAY AND LAND COMPANY, a corporation; CITY AND COUNTY OF HONOLULU; TERRITORY OF HAWAII; and all other persons, companies or corporations, either known or unknown, who claim to have or own any right, title or interest of any character whatever in said land,

Defendants.

PETITION FOR CONDEMNATION

To the Honorable, the Presiding Judges of the  
United States District Court for the District of  
Hawaii:

Now comes the United States of America, by Robert S. Tarnay, Special Assistant to the Attorney General, acting under the instructions of the Attorney General of the United States and at the request of the Secretary of Navy and respectfully represents to the Court: [570]

## I.

That this proceeding is instituted under the authority of divers and sundry Acts of Congress, among them the following:

The Act of Congress approved March 27, 1942 (Public Law 507—77th Congress)

The Act of Congress approved April 28, 1942 (Public Law 528—77th Congress)

and that the Secretary of Navy, acting under authority vested in him by law has determined that it is necessary that the United States of America acquire by condemnation, by judicial process, certain lands, more particularly described and shown on Exhibits "A" and "B", hereto annexed and made parts hereof.

## II.

That the lands sought to be condemned are located at Waiawa, Waimalu, Ewa, Island of Oahu, Territory of Hawaii, and lie wholly within the jurisdiction of this Court.

## III.

That the estate sought to be condemned in this action is the fee simple title, together with all improvements thereon and appurtenances thereunto belonging, subject to existing public utility, pipe line, irrigation and drainage easements, if any there be, to Parcels 1-A, 1-B, 2-A, 2-B and 3-A; and the fee simple title subject to an easement in Parcel 3-B in favor of the Oahu Railway and Land Company for railroad purposes only for so long as it is used for such purpose; said lands are for use

as empty drum storage area in connection with the Naval Supply Depot, Pearl Harbor.

## IV.

That Francis H. I. Brown; Edith Austin; Mabel Frazar Austin, Lindsley Austin and Boston Safe Deposit and Trust Company, a corporation, Trustees under the Will and of the Estate of Walter Austin, deceased; Honolulu Plantation Company, a California corporation; Hawaiian Trust Company, Limited, an Hawaiian corporation; Oahu Railway and Land Company, a corporation; City and County of Honolulu; Territory of Hawaii and all other persons, companies or corporations, either known or unknown, who claim to have or [571] own any right, title or interest of any character whatever in said land, are made defendants herein.

## V.

That the Secretary of Navy of the United States has determined that the utmost haste in expediting this project is vital to the War purposes of the United States and that he has, therefore, determined that immediate possession of Parcels 2-B and 3-A and all improvements thereon and appurtenances thereunto belonging, to the extent of the interest to be acquired therein, is necessary by the United States and that certain and adequate provisions have been made for the payment of just compensation which may be adjudged due for the condemnation of the lands described and shown on Exhibits "A" and "B".

That the petitioner has been in possession of Parcels 1-A and 1-B from and since November 13, 1943, pursuant to right of entry.

That the petitioner has been in possession of Parcel 2-A from and since November 12, 1943.

Wherefore, your Petitioner prays this Honorable Court to take jurisdiction of this cause and enter all orders, judgments and decrees necessary to determine title of said real estate condemned, or any part thereof, and to fix and determine that the continued possession of the lands identified in paragraph V is necessary for the War and Naval purposes of the United States and that the immediate possession of the lands also identified in paragraph V is likewise necessary for the War and Naval purposes of the United States; that upon payment into the registry of this Court for the use of the persons entitled thereunto of the sum adjudged to be full compensation for the condemnation of said lands, that title to said lands be vested in the United States of America in fee simple, subject to the exceptions set forth in paragraph III: and that the Court make distribution of the final awards among the persons entitled thereto as expeditiously as may be and for such other and further relief as to the Court may seem just and proper [572] in the premises.

UNITED STATES  
OF AMERICA,

By CHARLES F. RATHBUN,  
Special Asst. to the Atty Gen.

By /s/ ROBERT S. TARNAY,  
Special Asst. to the Atty Gen.

(Duly Verified.)

[573]

EXHIBIT "A"

Descriptions of Lands Situated at Waimalu,  
Ewa, Oahu, T. H.

Parcel	Area (Acres)	Owner
1-A	0.734	Francis H. I. Brown
1-B	0.110	Francis H. I. Brown
2-A	20.510	Edith Austin, 2/3 interest Walter Austin Trust Estate, 1/3 int. Honolulu Plantation Co., Lessee
2-B	2.155	Edith Austin, 2/3 interest Walter Austin Trust Estate, 1/3 int. Honolulu Plantation Co., Lessee
3-A	2.333	Oahu Railway and Land Co.
3-B	1.080	Oahu Railway and Land Co. (Railroad right-of-way).
Total	26.922	

Note: Parcel 3-B is subject to an easement for right of passage twenty (20) feet wide in favor of Parcel 2-B. [574]

PARCEL 1-A

Francis H. I. Brown—Owner

Land Situated at Waimalu, Ewa, Oahu, T. H.

Being a Portion of R. P. 327, L. C. Aw. 5586 to Kahiki. Being Also a Portion of Exclusion 4 of Land Court Application 950.

Beginning at the East corner of this parcel of land, on the Southwest side of Kamehameha Highway, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church"

being 1694.89 feet South and 8583.46 feet East, and running by azimuths measured clockwise from true South:

1.  $23^{\circ} 30'$ —444.93 feet along Lot 4-B-4 of Land Court Application 950 (Parcel 2-A);
2.  $122^{\circ} 00'$ —75.20 feet along Lot 4-B-4 of Land Court Application 950 (Parcel 2-A);
3.  $204^{\circ} 00'$ —431.86 feet along Lot 4-B-4 of Land Court Application 950 (Parcel 2-A) to a pipe;
4.  $204^{\circ} 00'$ —5.00 feet along the Southerly side of Kamehameha Highway to a pipe;
5.  $295^{\circ} 57' 30''$ —70.64 feet along the Southwest side of Kamehameha Highway to the point of beginning and containing an area of 31,965 square feet, or 0.734 acre, and as delineated on 14th Naval District Drawing No. OA-N1-808.

### PARCEL 1-B

Francis H. I. Brown—Owner

Land Situated at Waimalu, Ewa, Oahu, T. H.

Being a Portion of R. P. 329, L. C. Aw. 9407,  
Apana 2 to Kuaalu.

Beginning at the North corner of this parcel of land, on the Southwest side of Kamehameha Highway, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 2058.41 feet South and 9330.17 feet East, and running by azimuths measured clockwise from true South:

1.  $295^{\circ} 57' 30''$ —42.73 feet along the Southwest side of Kamehameha Highway;
2.  $40^{\circ} 30'$ —118.81 feet along Lot 4-B-4 of Land Court Application 950 (Parcel 2-A);
3.  $159^{\circ} 00'$ —62.00 feet along Lot 4-B-4 of Land Court Application 950 (Parcel 2-A);
4.  $230^{\circ} 00'$ —79.59 feet along Lot 4-B-4 of Land Court Application 950 (Parcel 2-A) to the point of beginning and containing an area of 4,790 square feet, or 0.11 acre, and as delineated on 14th Naval District Drawing No. OA-N1-808. [576]

### PARCEL 2-A

Owners: Edith Austin,  $\frac{2}{3}$  interest; Walter Austin Trust Estate,  $\frac{1}{3}$  interest.

Honolulu Plantation Co.—Lessee.

Land Situated at Waimalu, Ewa, Oahu, T. H.

Being Lot 4-B-4 of Land Court Application 950.

Beginning at a pipe at the West corner of this parcel of land, on the Northeast side of Oahu Railway and Land Company's 40-foot right-of-way the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 2418.30 feet South and 8005.80 feet East, and running by azimuths measured clockwise from true South:

1.  $210^{\circ} 25'$ —235.30 feet along R. P. 7268, L. C. Aw. 3834 and 7244, Part 1 to Puhi and Grant 130 to S. P. Hanchett to a pipe;

2.  $198^{\circ} 16'$ —650.30 feet along Lot 4-C-2 of Land Court Application 950 to a pipe;
3.  $263^{\circ} 10'$ —35.54 feet along Grant 130 to S. P. Hanchett to a pipe;
4.  $295^{\circ} 57' 30''$ —171.13 feet along the Southwest side of Kamehameha Highway to a pipe;
5.  $24^{\circ} 00'$ —431.86 feet along R. P. 327, L. C. Aw. 5586 to Kahiki (Parcel 1-A);
6.  $302^{\circ} 00'$ —75.20 feet along R. P. 327, L. C. Aw. 5586 to Kahiki (Parcel 1-A); [577]
7.  $203^{\circ} 30'$ —444.93 feet along R. P. 327, L. C. Aw. 5586 to Kahiki (Parcel 1-A);
8.  $295^{\circ} 57' 30''$ —830.50 feet along the Southwest side of Kamehameha Highway;
9.  $50^{\circ} 00'$ —79.59 feet along R. P. 329, L. C. Aw. 9407, Apana 2 to Kuaalu (Parcel 1-B);
10.  $339^{\circ} 00'$ —62.00 feet along R. P. 329, L. C. Aw. 9407, Apana 2 to Kuaalu (Parcel 1-B);
11.  $220^{\circ} 30'$ —118.81 feet along R. P. 329, L. C. Aw. 9407, Apana 2 to Kuaalu (Parcel 1-B);
12.  $295^{\circ} 57' 30''$ —18.51 feet along the Southwest side of Kamehameha Highway;
13.  $25^{\circ} 57' 30''$ —10.00 feet along the Southwest side of Kamehameha Highway to a pipe;
14.  $295^{\circ} 57' 30''$ —69.15 feet along the Southwest side of Kamehameha Highway to the Westerly bank of the Waimalu Stream passing over a pipe at 67.15 feet.

Thence following down along the Westerly bank of the Waimalu Stream for the next two (2) courses, the direct azimuths and distances

between points on the bank of said stream being:

15.  $37^{\circ} 40'$ —516.63 feet;
16.  $5^{\circ} 00'$ —101.10 feet; thence
17.  $86^{\circ} 09'$ —224.55 feet along the North side of Oahu Railway and Land Company's 40-foot right-of-way.  
Thence along the Northeast side of Oahu Railway and Land Company's 40-foot right-of-way, on a curve to the right, with a radius of 1453.48 feet, the chord azimuth and distance being:
18.  $104^{\circ} 33' 50''$ —918.25 feet to the point of beginning and containing an area of 20.510 acres, and as delineated on 14th Naval District Drawing No. OA-N1-808. [578]

#### PARCEL 2-B

Owners: Edith Austin,  $\frac{2}{3}$  interest; Walter Austin Trust Estate,  $\frac{1}{3}$  interest.

Honolulu Plantation Co., Lessee.

Land Situated at Waimalu, Ewa, Oahu, T. H.

Being Lot 5 of Land Court Application 950.

Beginning at the Northwest corner of this parcel of land, on the South side of Oahu Railway and Land Company's 40-foot right-of-way, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 2684.32 feet South and 8968.39 feet East, and running by azimuths measured clockwise from true South:

1.  $266^{\circ} 09'$ —155.00 feet along the South side of

Oahu Railway and Land Company's 40-foot right-of-way to the Westerly bank of the Waimalu Stream.

Thence following down along the Westerly bank of the Waimalu Stream for the next two (2) courses, the direct azimuths and distances between points on bank of said stream being:

2.  $351^{\circ} 20'$ —210.00 feet;
3.  $336^{\circ} 25'$ —546.00 feet.

Thence following along highwater mark of Pearl Harbor for the next two (2) courses, the direct azimuths and distances between points at said highwater mark being:

4.  $134^{\circ} 50'$ —447.00 feet; [579]
5.  $119^{\circ} 04' 30''$ —74.05 feet; thence
6.  $176^{\circ} 12'$ —347.20 feet along a portion of L. C. Aw. 11216, Apana 9 to M. Kekauonohi (Parcel 3-A) to the point of beginning and containing and area of 2.155 acres, and as delineated on 14th Naval District Drawing No. OA-N1-808.

Together with a full, free and perpetual easement or right of passage way, either on foot or with horses, cattle, carts, wagons and other vehicles however propelled, over the following described piece of land, said easement being delineated on the aforesaid drawing:

Beginning at the Southwest corner of this parcel of land, being also the initial point of Lot 5 of Land Court Application 950 (Parcel 2-B), as above described, and running by true azimuths:

1.  $176^{\circ} 09'$ —40.00 feet;
2.  $266^{\circ} 09'$ —20.00 feet;

3.  $356^{\circ} 09'$ —40.00 feet;
4.  $86^{\circ} 09'$ —20.00 feet to the point of beginning and containing an area of 800 square feet.

### PARCEL 3-A

Oahu Railway and Land Co., Owner.

Land Situated at Waimalu, Ewa, Oahu, T. H.

Being a Portion of L. C. Aw. 11216, Apana 9 to M. Kekauonohi.

Beginning at the Northwest corner of this parcel of land, on the South side of Oahu Railway and Land Company's 40-foot right-of-way, [580] the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 2684.32 feet South and 8968.39 feet East, and running by azimuths measured clockwise from true South:

1.  $356^{\circ} 12'$ —347.20 feet along Lot 5 of Land Court Application 950 (Parcel 2-B) to high-water mark of Pearl Harbor.

Thence following along highwater mark of Pearl Harbor for the next three (3) courses, the direct azimuths and distances between points at said highwater mark being:

2.  $123^{\circ} 23'$ —496.16 feet;
3.  $114^{\circ} 00'$ —463.00 feet;
4.  $150^{\circ} 30'$ —35.00 feet.

Thence along the South side of Oahu Railway and Land Company's 40-foot right-of-way, on

a curve to the left, with a radius of 1493.48 feet, the chord azimuth and distance being:

5.  $281^{\circ} 11' 17''$ —775.00 feet;
6.  $266^{\circ} 09'$ —71.32 feet along the South side of Oahu Railway and Land Company's 40-foot right-of-way to the point of beginning and containing an area of 2.333 acres, and as delineated on 14th Naval District Drawing No. OAN1-808.

### PARCEL 3-B

Oahu Railway and Land Co., Owner.

Land Situated at Waimalu, Ewa, Oahu, T. H.

Being a Portion of L. C. Aw. 11216, Apana 9 to M. Kekauonohi. [581]

Beginning at a pipe at the Northwest corner of this parcel of land, being also the West corner of Lot 4-B-4 of Land Court Application 950, the coordinates of which referred to Government Survey Triangulation Station "Ewa Church" being 2418.30 feet South and 8005.80 feet East, and running by azimuths measured clockwise from true South:

Along Lot 4-B-4 of Land Court Application 950 (Parcel 2-A), on a curve to the left, with a radius of 1453.48 feet, the chord azimuth and distance being:

1.  $284^{\circ} 33' 50''$ —918.25 feet;
2.  $266^{\circ} 09'$ —224.55 feet along Lot 4-B-4 of Land Court Application 950 (Parcel 2-A);

3.  $353^{\circ} 37'$ —40.04 feet across Oahu Railway and Land Company's 40-foot right-of-way;
4.  $86^{\circ} 09'$ —226.32 feet along Lot 5 of Land Court Application 950 (Parcel 2-B) and remainder of L. C. Aw. 11216, Apana 9 to M. Kekauonohi (Parcel 3-A).

Thence along remainder of L. C. Aw. 11216, Apana 9 to M. Kekauonohi (Parcel 3-A) and highwater mark of Pearl Harbor, on a curve to the right, with a radius of 1493.48 feet, the chord azimuth and distance being:

5.  $104^{\circ} 31' 46''$ —941.81 feet;
6.  $210^{\circ} 25'$ —40.04 feet across Oahu Railway and Land Company's 40-foot right-of-way to the point of beginning and containing an area of 1.080 acres, and as delineated on 14th Naval District Drawing No. OA-N1-808.

Subject to an easement with a full, free and perpetual [582] easement or right of passage way, either on foot or with horses, cattle, carts, wagons and other vehicles however propelled, over the following described piece of land, said easement being delineated on aforesaid drawing:

Beginning at the Southwest corner of this piece of land, being also the initial point of Lot 5 of **Land Court Application 950 (Parcel 2-B)**, as above described, and running by true azimuths:

1.  $176^{\circ} 09'$ —40.00 feet;
2.  $266^{\circ} 09'$ —20.00 feet;

3. 356° 09'—40.00 feet;
4. 86° 09'—20.00 feet to the point of beginning and containing an area of 800 square feet.

Honolulu, T. H., December 31, 1943.

/s/ R. M. TOWILL,

Registered Professional Surveyor Certificate Number 151.

[Endorsed]: Filed Oct. 20, 1944.

[583]

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[Title of District Court and Cause No. 536.]

MOTION FOR ORDER AMENDING  
PETITION IN CONDEMNATION

Now comes the Petitioner, United States of America, by its attorneys, Charles F. Rathbun and Robert S. Tarnay, Special Assistants to the Attorney General, and moves that an order be entered amending the Petition in Condemnation by striking from Paragraph III the following language:

“ . . . fee simple title to Parcel 3-B, reserving, however, to the Oahu Railway and Land Company an easement for railroad purposes for so long as such use is continued. . . . ”

and inserting in lieu thereof the following:

“ . . . fee simple title, subject to an easement in Parcel 3-B in favor of the Oahu Railway and Land Company for railroad purposes, only, for so long as it is used for such purposes. ”

Petitioner states that it is necessary to amend

its Petition in Condemnation in order to describe the estate taken in conformity with the language contained in the letter of the Secretary of the Navy, on file in this cause.

Dated: Honolulu, T. H., this 27th day of February, 1945.

UNITED STATES OF  
AMERICA,

By /s/ CHARLES F. RATHBUN,  
Special Assistant to the  
Attorney General,

By /s/ ROBERT S. TARNAY,  
Special Assistant to the  
Attorney General.

[Endorsed]: Filed Feb. 27, 1945. [585]

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[Title of District Court and Cause No. 536.]

ORDER AMENDING PETITION IN  
CONDEMNATION

Now this 28th day of February, 1945, upon motion by the petitioner, United States of America, by its attorneys, Charles F. Rathbun and Robert S. Tarnay, and the defendant, Oahu Railway and Land Company, appearing by its counsel, Anderson, Wrenn & Jenks, and it further appearing that it is necessary to conform the description of the estate being taken in this matter to the description of said estate contained in the letter of the Secretary of the Navy on file in this cause,

It is ordered that the petition be amended by striking from Paragraph III thereof the following:

“ . . . fee simple title to Parcel 3-B, reserving, however, to the Oahu Railway and Land Company an easement for railroad purposes for so long as such use is continued. . . .”

and inserting in lieu thereof the following language:

“ . . . fee simple title, subject to an easement in Parcel 3-B in favor of the Oahu Railway and Land Company for railroad purposes, only for so long as it is used for such purpose. . . .”

Dated: Honolulu, T. H., this 28th day of February, 1945.

/s/ J. FRANK McLAUGHLIN,  
Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed Feb. 28, 1945. [586]

[Title of District Court and Cause No. 536.]

### DECLARATION OF TAKING

Whereas, pursuant to the Acts of Congress approved March 27, 1942 (Public Law 507, 77th Congress), and April 28, 1942 (Public Law 528, 77th Congress), the above styled condemnation proceeding has been instituted.

Now, therefore, pursuant to the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), I, Secretary of the Navy, do hereby make and cause to be filed this declaration of taking, and by virtue of authority thereof do hereby state that the lands selected for acquisition aggregate 26.922 acres, more or less, situate at Waiawa, Waimalu, Ewa, Oahu, Territory of Hawaii, more particularly described in Exhibit "A" attached hereto and made a part hereof. The lands [587] are delineated on a map entitled "Boundary Map, Waiau Drum Storage, Waimalu, Ewa, Oahu, T. H., designated as 14th N. D. Dwg. OA-N1-808, attached hereto as Exhibit "B" and made a part hereof.

And I do declare said lands to be taken under the authority of the aforesaid Acts of Congress; that the use to which said lands are to be put is for an empty drum storage area in connection with the Naval Supply Depot, Pearl Harbor, and other Naval purposes, as authorized by said Acts; and that the estate hereby taken in said lands for the public use aforesaid is fee simple, subject to an easement in Parcel 3-B in favor of the Oahu Rail-

way and Land Company for railroad purposes, only for so long as it is used for such purpose.

And I, Secretary of the Navy, do hereby state that the sum of money estimated by me to be just compensation for said lands and all improvements thereon and appurtenances thereunto belonging, is Five Thousand Three Hundred and Ninety-one Dollars (\$5,391.00), which sum is hereby deposited into the registry of the court for the use and benefit of the persons entitled thereto, and that the names of the owners of said property and improvements thereon which are hereby taken are shown on Schedule "A" which is attached hereto and made a part of this declaration of taking.

I am of the opinion that the ultimate award for the taking of said lands will be within the limits prescribed by Congress.

In witness whereof, the petitioner, by and through the [588] Secretary of the Navy, has caused this declaration of taking to be signed in the City of Washington, District of Columbia, this 26th day of July, 1945.

UNITED STATES OF  
AMERICA,

By /s/ A. L. GATES,  
Acting. [589]

SCHEDULE "A"

The names of the persons having title to or other interest in the lands described in the within declaration of taking, and the amounts estimated to

be fair compensation for each respective ownership, including all improvements thereon, are as follows:

Parcel	Name of Owner	Aeres	Estimated Just Compensation
1-A	Francis H. I. Brown	0.734)	\$ 250.00
1-B	Francis H. I. Brown	0.110)	
2-A	Edith Austin & W. Austin Est.	20.510	5,130.00
2-B	Edith Austin & W. Austin Est.	2.155	5.00
3-A	Oahu Railway & Land Co.	2.333	5.00
3-B	Oahu Railway & Land Co.	1.080	1.00
Totals		26.922	\$5,391.00

[Printer's Note: Exhibit "A" is the same as Exhibit "A" set out at pages 301-310 of this printed Record.

[Endorsed]: Filed Aug. 20, 1945. [590]

[Title of District Court and Cause No. 536.]

## MOTION FOR ORDER AMENDING PETITION IN CONDEMNATION

Now comes the Petitioner, United States of America, by its Attorney, Charles F. Rathbun, Special Assistant to the Attorney General, and moves that an order be entered amending the Petition in Condemnation by striking Paragraph III of said Petition in its entirety and substituting therefore a new Paragraph III as follows:

"That the estate sought to be condemned in said lands in this action is in fee simple, subject to an easement in Parcel 3-B in favor of

the Oahu Railway and Land Company for railroad purposes, only for so long as it is used for such purposes.”

Petitioner states that it is necessary that the petition herein be amended to more accurately define the estate being taken.

Dated: Honolulu, T. H. this 20th day of August, 1945.

UNITED STATES OF  
AMERICA,

By /s/ CHARLES F. RATHBUN,  
Special Assistant to the  
Attorney General.

[Endorsed]: Filed Aug. 20, 1945. [602]

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[Title of District Court and Cause No. 536]

ORDER AMENDING PETITION IN  
CONDEMNATION

Now this 20th day of August, 1945, upon motion by the Petitioner, United States of America, by its attorney, Charles F. Rathbun, Special Assistant to the Attorney General, it appearing that it is necessary to more accurately define the estate being taken herein by amending the Petition in the above cause,

It is ordered:

That the Petition in Condemnation herein be amended by striking therefrom Paragraph III in its entirety and substituting therefore a new Paragraph III as follows:

“That the estate sought to be condemned in said lands in this action is in fee simple, subject to an easement in Parcel 3-B in favor of the Oahu Railway and Land Company for railroad purposes, only for so long as it is used for such purpose.”

Dated: Honolulu, T. H., this 20th day of August, 1945.

/s/ D. E. METZGER,  
Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed Aug. 20, 1945. [603]

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In the District Court of the United States  
for the District of Hawaii

April Term 1945

Civil No. 536

UNITED STATES OF AMERICA,

Petitioner,

vs.

26.922 ACRES OF LAND, more or less, situate at  
Waiwa, Waimalu, Ewa, Island of Oahu, Terri-  
tory of Hawaii; Francis H. I. Brown, et al..

Defendants.

ORDER AND JUDGMENT ON DECLARATION  
OF TAKING

It appearing that on October 20, 1944, the United States of America, filed a Petition in Condemnation of certain land described and shown on Ex-

hibits "A" and "B" attached to the Petition in Condemnation herein and on Exhibits "A" and "B" attached to the Declaration of Taking this day filed herein; and,

It further appearing that said Declaration of Taking having been filed on this 20th day of August, 1945, and being signed by A. L. Gates, Acting Secretary of the Navy, and said Declaration of Taking was filed under and pursuant to provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), and declaring taken the full fee simple title to the lands described and shown on Exhibits "A" and "B" attached to the Petition in Condemnation herein, and upon Exhibits "A" and "B" attached to the Declaration of Taking herein to the extent shown in said Declaration of Taking; that the uses of said lands are [604] those described in the Declaration of Taking and in the Petition filed herein; and that the said Declaration of Taking sets forth the estimate of just compensation made pursuant to law and that contemporaneously with the filing of said Declaration of Taking, there was deposited in the Registry of this Court for the use and benefit of the persons entitled thereto the sum of Five Thousand Three Hundred and Ninety-one Dollars (\$5,391.00),

It is ordered, adjudged and decreed that by virtue of the filing of said Declaration of Taking and the deposit of said money, full fee simple title to the land described and shown on Exhibits "A" and "B" attached to the Petition herein and Exhibits "A" and "B" attached to the Declaration of Tak-

ing herein, be and it is hereby indefeasibly vested in the United States of America, subject to the rights recited in said Declaration of Taking in favor of the Oahu Railway and Land Company, an Hawaiian Corporation.

It is further ordered that a copy of this Order be promptly served by the United States Marshal upon each of the defendants in this cause. The Marshal is further ordered to post a copy hereof in a conspicuous place on the premises and to forthwith make due return of his said service to this Court.

Dated: Honolulu, T. H., this 20th day of August, 1945.

(Seal)            /s/ D. E. METZGER,  
Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed Aug. 20, 1945. [605]

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[Title of District Court and Cause No. 536.]

ANSWER OF HONOLULU PLANTATION  
COMPANY

One of the Defendants Above Named

Comes now Honolulu Plantation Company, a corporation, organized under the laws of the State of California, and doing business in the Territory of Hawaii, one of the defendants in the above entitled cause, and for answer to the petition filed herein says:

## I.

That is has neither knowledge or information sufficient to form a belief as to the allegations set forth and contained in Paragraphs I, III, IV, V, VI and VII of said petition, and therefore it neither admits nor denies the same but leaves the petitioner to its proof thereof.

## II.

That it admits the allegations contained in Paragraph II of said petition.

## III.

That with respect to the allegations of said petition that it claims an interest in the property described in said petition [607] this defendant admits the same and alleges that at the time of the filing of said petition and until judgment or order was entered on declaration of taking filed in said causes it was the owner of an interest in the lands and in some of the improvements thereon and also admits that its lessor has an interest in the lands described in said petition which are under lease to this defendant; that the lease creating such interest and estate will be submitted to the Court on the trial of said causes.

And this defendant further alleges as follows:

That for and during a period of over forty years this defendant has been continuously operating and conducting and is now operating and conducting a sugar mill and plantation at Aiea in the District of Ewa, Island of Oahu, T. H., and has been at all times during said period and now is engaged in the business of growing sugar cane and manufacturing sugar therefrom;

That most of the acreage of land taken, by reason of the fertility of the soil thereon, their low elevation, and the comparatively small expense with which they can be irrigated, is peculiarly adapted to the cultivation and growth of sugar cane, and that this defendant was at the time of the filing of the petition in this cause and until the date fixed for the surrendering of possession by the judgment or order on the Declaration of Taking entered in this cause and for many years prior thereto had been profitably using said lands for the cultivation and growth of sugar cane;

That the lands included within the area sought to be condemned which are held by this defendant under lease as aforesaid have a special and enhanced value by reason of the establishment by this defendant of a sugar mill and works, in close proximity to said lands, for the manufacture of sugar from cane grown and cultivated thereon and on other lands owned and/or leased by this defendant and [608] by reason of the development by this defendant of a water supply for the irrigation of said lands, and other lands as aforesaid by means of artesian wells, pumping machinery and otherwise;

That for the purpose of cultivating the sand lands, this defendant has constructed improvements thereon;

That the parcel of land sought to be condemned by said petition in which this defendant has leasehold interest was at the time of the filing of the said petition in this cause and until judgment or

order was entered on Declaration of taking filed in this cause, and for many years prior thereto had been, occupied and cultivated by this defendant as integral parts of the sugar plantation operated and conducted by it at Aiea aforesaid and in connection with other large and contiguous tracts situated outside of the lands described in said petition but comprised within the said plantation and demised to this defendant by a number of leases and that by the taking of said lands described in the said petitions the integrity of said sugar plantation will be destroyed and the unitary value of the leasehold interests and estates of this defendant in such other and contiguous tracts of land will be greatly impaired and diminished.

Wherefore this defendant prays (1) that the damages suffered by this defendant by reason of the taking of the lands and properties described in said petitions may be determined and the amount thereof be awarded to and paid to this defendant, and (2) for such other and general relief as may be meet and proper in the premises.

Dated: Honolulu, T. H., June 18, 1946.

HONOLULU PLANTATION  
COMPANY,

By VITOUSEK, PRATT & WINN,  
Its Attorneys,  
Defendant above named.

[Endorsed]: Filed June 18, 1946. [609]

In the District Court of the United States  
for the District of Hawaii

October Term 1944

Civil No. 540

UNITED STATES OF AMERICA,

Petitioner,

vs.

124.914 acres of land, more or less, situate at Haiku Valley, Heeia, Koolaupoko, Oahu, Territory of Hawaii, HAROLD K. L. CASTLE, GEORGE M. COLLINS, JOHN K. CLARKE, FRANK E. MIDKIFF, EDWIN P. MURRAY and JOSEPH B. POINDEXTER, Trustees under the Will and of the Estate of Bernice P. Bishop; MARY WONG YUEN CHONG; JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER F. FREAR and JOHN E. RUSSELL, Trustees under the Will and of the Estate of Samuel M. Damon; ALICE H. COOKE; HELEN S. DAVIS. ALAN S. DAVIS. GEORGE G. FULLER, WILHELMINA TENNEY; HYGIENIC DAIRY, LTD., a corporation, NILS P. LARSEN; BISHOP TRUST COMPANY, LTD., an Hawaiian corporation, HAWAIIAN ELECTRIC COMPANY, LTD., an Hawaiian corporation; MUTUAL TELEPHONE COMPANY, LTD., an Hawaiian corporation; J. PLATT COOK; THE ROMAN CATHOLIC CHURCH in the Territory of Hawaii, an Hawaiian corporation; HONOLULU PLANTATION COMPANY, a corporation; KELEKIA R. KAAE; W. T. LEE KWAI; MRS. POLLY K. HENRY; MRS. J. K. JONES; HEE KWONG; AU SIU HIN; JOHN PUNUA; CHANG WONG; THERESA R. KAAE; ROSE WONG ESTATE; CATHERINE E. STEWARD; MRS. KAMEHAIKU LONO; MARY K. McCABE; S. SCOTT; MRS. JUSTINA JOHNSTON; MARY S. MAII; ELSIE LAM AYAU; KIKIA AHUNA; HAWAIIAN SAVINGS AND LOAN ASSOCIATION; LOUISE K. JONES; EVELYN L. GOUVEIA; SAMUEL LONO; MALIA McCABE; LEONARD KEA; MRS. ELIZABETH SILVA; CHRISTOPHER STEWARD; DAVID STEWARD; JAMES P. STEWARD; AN-

GELINA A. PAHIA; WILLIAM SYLVA and WIFE: MAEHA ANTONE; WALTER R. COOMBS; FRANCIS LEW; CHARLES B. DWIGHT; HEEIA COMPANY, LTD., a corporation; CITY AND COUNTY OF HONOLULU, TERRITORY OF HAWAII, and all other persons, companies or corporations, either known or unknown, who claim to have or own any right, title or interest of any character in said land,

Defendants.

## PETITION FOR CONDEMNATION

To the Honorable, the Presiding Judges of the United States District Court for the District of Hawaii:

Now comes the United States of America, by Robert S. Tarnay, Special Assistant to the Attorney General, acting under the instructions of the Attorney General of the United States and at the request of the Secretary of Navy and respectfully represents to the Court.

### I.

That this proceeding is instituted under the authority of divers and sundry Acts of Congress, among them the following:

The Act of Congress approved March 27, 1942 (Public Law 507—77th Congress)

The Act of Congress approved April 28, 1942 (Public Law 528—77th Congress)

and that the Secretary of Navy, acting under authority vested in him by law has determined that it is necessary that the United States of America acquire by condemnation, by judicial process, certain lands more particularly described on Exhibit "A" hereto annexed and made a part hereof as though

set forth at length and shown upon a map marked Exhibit "B", also attached hereto.

## II.

That the lands sought to be condemned are located at Haiku Valley, Heeia, Keelaupeke, Oahu, Territory of Hawaii, and lie wholly within the jurisdiction of this Court.

## III.

That the estate sought to be condemned in this action is the fee simple title, together with all improvements thereon and appurtenances thereunto belonging, subject to the following easements and rights:

(a) An easement over Parcel 6 and Parcel 7 in favor of the City and County of Honolulu for water pipe lines, together with the right of ingress and egress thereto, for the purpose of maintaining, operating and repairing said water lines. [511]

(b) The right of ingress and egress to the City and County of Honolulu over and across Parcel 6 and Parcel 7, giving access to Parcel 1-F for the purpose of maintaining, operating and repairing the water pipe lines and reading the meter located on said Parcel 1-F.

(c) The right of ingress and egress to the City and County of Honolulu over and across Parcel 6 and Parcel 7, giving access to Parcel 1-B for the purpose of repairing, maintaining, operating and inspecting the water tunnel located on said Parcel 1-B;

said easements and rights to be subject to such reasonable rules and regulations as the United

States of America shall promulgate through its duly authorized representatives for the security of the Naval Reservation for which the land involved in this action is being taken; said lands are to be used for a radio station.

#### IV.

That Harold K. L. Castle; George M. Collins, John K. Clarke, Frank E. Midkiff, Edwin P. Murray and Joseph B. Poindexter, Trustees under the Will and of the Estate of Bernice P. Bishop; Mary Wong Yuen Cheng, John Waterhouse, Ernest Hay Wodehouse, Walter F. Frear and John E. Russell, Trustees under the Will and of the Estate of Samuel M. Damon; Alice H. Cooke, Helen S. Davis; Alan S. Davis, George G. Fuller; Wilhelmina Tenney, Hygienic Dairy, Ltd., a corporation; Nils P. Larsen; Bishop Trust Company, Ltd., an Hawaiian corporation; Hawaiian Electric Company, Ltd., an Hawaiian corporation; Mutual Telephone Company, Ltd., an Hawaiian corporation; J. Platt Cook; The Roman Catholic Church in the Territory of Hawaii, an Hawaiian corporation; Honolulu Plantation Company, a corporation; Kelekia R. Kaae; W. T. Lee Kwai; Mrs. Polly K. Henry; Mrs. J. K. Jones; Hee Kwong; Au Siu Hin; John Punua; Chang Wong; Theresa R. Kaae; Rose Wong Estate; Catherine E. Steward; Mrs. Kamehaiku Lono; Mary K. McCabe; S. Scott; Mrs. Justina Johnston; Mary S. Maii; Elsie Lam Ayau; Kikia Ahuna; Hawaiian Savings and [612] Loan Association; Louise K. Jones; Evelyn L. Gouveia; Samuel Lono; Malia

McCabe; Leonard Kea; Mrs. Elizabeth Silva, Christopher Steward; David Steward; James P. Steward, Angelina A. Pahia; William Sylva and wife; Maeha Antone; Walter R. Coombs; Francis Lew; Charles B. Dwight; Heeia Company, Ltd., a corporation; City and County of Honolulu; Territory of Hawaii; and all other persons, companies or corporations, either known or unknown, who claim to have or own any right, title or interest of any character whatever in said land, are made defendants herein.

V.

That the Secretary of Navy of the United States has determined that the utmost haste in expediting this project is vital to the War purposes of the United States and that he has, therefore, determined that possession of said lands, to the extent of the interest to be acquired therein, is necessary by the United States and that certain and adequate provisions have been made for the payment of just compensation which may be adjudged due for the condemnation of the lands described and shown on Exhibits "A" and "B".

That the petitioner was in possession of Parcel 6 from and since July 1, 1942 under lease, extensions of which expired June 30, 1944 and petitioner has remained in possession of said parcel from said latter date.

That the petitioner was in possession of Parcels 7, 8 and 9 from and since April 1, 1943 under lease, extensions of which expired June 30, 1944

and petitioner has remained in possession of said parcels from said latter date.

That the petitioner was in possession of Parcels 10, 13 and 14 from and since July 1, 1942, pursuant to right of right of entry.

Wherefore, your Petitioner prays this Honorable Court to take jurisdiction of this cause and enter all orders, judgments [613] and decrees necessary to determine title of said real estate condemned, or any part thereof, and to fix and determine that the continued possession of the lands identified in Paragraph V is necessary for the War and Naval purposes of the United States; that upon payment into the registry of this Court for the use of the persons entitled thereunto of the sum adjudged to be full compensation for the condemnation of said land, that title to said land be vested in the United States of America, in fee simple, subject to the exceptions set forth in Paragraph III, and that the Court make distribution of the final awards among the persons entitled thereto as expeditiously as may be and for such other and further relief as to the Court may seem just and proper in the premises.

UNITED STATES  
OF AMERICA,

By CHARLES F. RATHBUN,  
Special Asst. to the Atty. Gen.

By /s/ ROBERT S. TARNAY,  
Special Asst. to the Atty. Gen.

EXHIBIT A

(Haiku Radio Station)

Land Situated in the Districts of Koolaupoko, Ewa,  
and Honolulu, Oahu, T. H.

Descriptions of

Parcel	Owner	Situated at	Area, Acs.
6	Harold K. L. Castle	Haiku Valley, Heeia	3.352
7	Trustees of B. P. Bishop Estate	Haiku Valley, Heeia	110.112
8	Harold K. L. Castle	Haiku Valley, Heeia	1.950
9	Mary Wong Yuen Chong	Haiku Valley, Heeia	1.800
10	Trustees of B. P. Bishop Estate	Halawa, Ewa	1.400
13	Harold K. L. Castle	Luluku, Kaneohe	5.300
14	Trustees of Samuel M. Damon Estate	Moanalua, Honolulu	1.000

PARCEL 6

Land Situated on the South Side of Haiku Stream About 10,000 Feet in a Southwesterly Direction From the Junction of Kamehameha Highway and Haiku Road.

Being the Whole of Lot E of Land Court Application 1342.

Beginning at an 1¼ inch pipe in a concrete monument at the Southeast corner of this parcel of land, the true azimuth and distance to an 1 inch pipe in concrete marked "c" being 279° 00' 50.00 feet, and the coordinates of said point of beginning referred to Government Survey Triangulation Station "Heeia" being 13,968.09 feet South and 1872.45 feet West, and thence running by azimuths measured clockwise from true South:

1.  $86^{\circ} 30'$ —270.60 feet along Lots Q-2 and Q-3 of Land Court Application 1100 to an  $1\frac{1}{4}$  inch pipe in concrete monument and from the end of said course, the true azimuth and distance to an  $1\frac{1}{4}$  inch pipe in concrete marked "F.R." marking the Forest Reserve Line being  $300^{\circ} 25' 28.77$  feet;
2.  $130^{\circ} 30'$ —233.70 feet along Lot Q-3 of Land Court Application 1100 to an  $1\frac{1}{4}$  inch pipe;
3.  $167^{\circ} 30'$ —132.99 feet along L. C. Aw. 5969, Apana 2 to Moalea to South edge of Haiku Stream and passing over an  $1\frac{1}{4}$  inch pipe at 107.39 feet. Thence along South edge of Haiku Stream along Lots Q-3 [616] and Q-2 of Land Court Application 1100 for the next two (2) courses, the direct azimuths and distances between points on edge of said stream being;
4.  $250^{\circ} 00'$ —200.00 feet;
5.  $290^{\circ} 57' 30''$ —446.75 feet to an 1 inch pipe;
6.  $36^{\circ} 30'$ —216.10 feet along Lot Q-2 of Land Court Application 1100 to the point of beginning and passing over an 1 inch pipe at 25.40 feet, and containing an area of 3.352 acres, and as delineated on 14th Naval District Drawing No. OA-N1-773.

Together with rights-of-way to and from Haiku Road leading out to Kamehameha Highway over Easements 21 and 16 as shown and designated on maps accompanying Land Court Application 1100.

Subject to an easement for pipeline and road in favor of the Suburban Water System of the City and County of Honolulu. [617]

## PARCEL 7

Land Situated in Haiku Valley, Heeia, Koolau-poko, Oahu, T. H.

Being a Portion of Lot Q-2 of Land Court Application 1100.

Beginning at the South corner of this parcel of land, being also the South corner of Lot Q-2 and on the boundary of Lot Q-3 of Land Court Application 1100, the coordinates of which referred to Government Survey Triangulation Station "Heeia" being 15,468.96 feet South and 1,260.00 feet West, and running by azimuths measured clockwise from true South:

1.  $149^{\circ} 44'$ —1701.76 feet along Lot Q-3 of Land Court Application 1100;
2.  $179^{\circ} 52'$ —16.08 feet along Lot Q-3 of Land Court Application 1100;
3.  $266^{\circ} 30'$ —245.78 feet along Lot E of Land Court Application 1342;
4.  $216^{\circ} 30'$ —216.10 feet along Lot E of Land Court Application 1342. Thence along the South edge of Haiku Stream along Lot E of Land Court Application 1342, the direct azimuth and distance between points on edge of said stream being;
5.  $112^{\circ} 13' 30''$ —404.73 feet; [618]
6.  $179^{\circ} 52'$ —937.00 feet along Lot Q-3 of Land Court Application 1100;
7.  $279^{\circ} 25'$ —486.00 feet along Lot Q-3 of Land Court Application 1100;

8.  $248^{\circ} 42'$ —391.10 feet along Lot Q-3 of Land Court Application 1100;
9.  $239^{\circ} 30'$ —157.00 feet along Lot Q-3 of Land Court Application 1100;
10.  $173^{\circ} 26'$ —114.00 feet along Lot Q-3 of Land Court Application 1100;
11.  $288^{\circ} 29'$ —772.00 feet along remainder of Lot Q-2 of Land Court Application 1100;
12.  $323^{\circ} 02' 45''$ —1765.62 feet along remainder of Lot Q-2 of Land Court Application 1100;
13.  $56^{\circ} 03'$ —66.50 feet along Lot Q-3 of Land Court Application 1100;
14.  $54^{\circ} 15'$ —2271.86 feet along Lot Q-3 of Land Court Application 1100 to the point of beginning and containing a gross area of 113.862 acres and a net area of 110.112 acres, after deducting therefrom Parcels 8 and 9 hereinafter described, and as delineated on 14th Naval District Drawing No. OA-N1-773.

Subject to rights-of-way over easements as shown and designated on maps of Land Court Application 1100. [619]

### PARCEL 8

Land Situated on the North Side of Haiku Stream About 8500 Feet in a Southwesterly Direction From the Junction of Kamehameha Highway and Haiku Road in Haiku Valley, Heeia, Loo-laupoko, Oahu, T. H.

Being Lot D of Land Court Application 1342.

Beginning at a pipe at the East corner of this

parcel of land and on the Northerly side of Haiku Stream, the true azimuth and distance to a pipe marking the initial point of Exclusion 49 in Land Court Application 1100 being  $311^{\circ} 01' 240.00$  feet, and the coordinates of said point of beginning referred to Government Survey Triangulation Station "Heeia" being 13,161.10 feet South and 441.48 feet West, and thence running by azimuths measured clockwise from true South:

Along the Northerly Side of Haiku Stream along Lot Q-2 of Land Court Application 1100 for the first two (2) courses, the direct azimuths and distances between points on the Northerly side of said stream being:

1.  $44^{\circ} 58'$ —473.70 feet;
2.  $107^{\circ} 30'$ —230.00 feet to a pipe;
3.  $231^{\circ} 33' 30''$ —436.80 feet along Lot Q-2 of Land Court Application 1100 to a pipe;
4.  $271^{\circ} 30'$ —212.10 feet along same to the point of beginning and containing an area of 1.950 acres, and as delineated on 14th Naval District Drawing No. OA-N1-773.

Together with rights-of-way to and from Haiku Road leading out to Kamehameha Highway over Easements 20 and 16, as shown and designated on maps accompanying Land Court Application 1100.

## PARCEL 9

Land Situated in Haiku Valley, Heeia, Koolau-poko, Oahu, T. H.

Being Royal Patent 1003, Land Commission Award 3393, Apana 1 to Puueokahi.

(This parcel of land is designated as Exclusion 49 within Lot Q in Land Court Application 1100, shown on Panel 50.)

Beginning at a pipe on the Southerly boundary of this parcel of land, the true azimuth and distance to a pipe in concrete on the North edge of Haiku Road being  $338^{\circ} 30' 100.00$  feet, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Heeia" being 13,318.61 feet South and 260.40 feet West, and thence running by azimuths measured clockwise from true South:

1.  $65^{\circ} 35'$ —444.10 feet along Lot Q-2 of Land Court Application 1100 to a pipe and passing over a pipe at 190.50 feet;
2.  $81^{\circ} 35'$ —69.30 feet along Lot Q-2 of Land Court Application 1100 to a pipe on the Southerly edge of Haiku Stream. Thence along the Southerly edge of Haiku Stream along Lot Q-2 of Land Court Application 1100 to a pipe, the direct azimuth and distance being:
3.  $228^{\circ} 01'$ —700.55 feet;
4.  $319^{\circ} 30'$ —59.20 feet along Lot Q-2 of Land Court Application 1100 to a pipe; [621]
5.  $20^{\circ} 35'$ —245.50 feet along Lot Q-2 of Land

Court Application 1100 to the point of beginning and passing over a pipe at 121.60 feet and containing an area of 1.800 acres, and as delineated on 14th Naval District Drawing No. OA-N1-773.

Together with rights-of-way to and from Haiku Road leading out to Kamehameha Highway over Easements 19 and 16, as shown and designated on maps accompanying Land Court Application 1100.

### PARCEL 10

Land Situated at Halawa, Ewa, Oahu, T. H.

Being a Portion of the Land of North Halawa, Royal Patent 6717, Land Commission Award 7712 and 8516-B to M. Kekuanaoa and Kamaikui.

Beginning at the Southeast corner of this parcel of land, on the boundary of Lot Q-3 of Land Court Application 1100, and on the boundary of the government land of Iolekaa, the coordinates of which referred to Government Survey Triangulation Station "Heeia" being 11,818.39 feet South and 4,683.55 feet West, and running by azimuths measured clockwise from true South:

Following up along the middle of Koolau Range along the land of Heeia, Lot Q-3 of Land Court Application 1100, the direct azimuth and distance between points on middle of said Koolau Range being:

1.  $55^{\circ} 00'$ —696.00 feet;
2.  $145^{\circ} 00'$ —84.22 feet along remainder of the land of Halawa;

3.  $235^{\circ} 00'$ —750.00 feet along remainder of the land of Halawa. Thence following along the middle of Koolau Range along the government land of Iolekaa, the direct azimuth and distance between points on middle of said Koolau Range being:
4.  $357^{\circ} 40'$ —100.05 feet to the point of beginning and containing an area of 1.4 acres, and as delineated on 14th Naval District Drawing No. OA-N1-773. [623]

### PARCEL 13

Land Situated at Luluku, Kaneohe, Koolaupoko, Oahu, T. H.

Being a Portion of the Land of Luluku, Royal Patent 7984, Land Commission Award 4452, Apana 13 to H. Kalama.

Beginning at the Northwest corner of this parcel of land, on the boundary between the lands of Luluku, Moanalua and Heeia, the coordinates of which referred to Government Survey Triangulation Station "Heeia" being 17,898.75 feet South and 504.03 feet West, and running by azimuths measured clockwise from true South:

Following down along the middle of ridge between the lands of Luluku and Heeia, the direct azimuth and distance between points on middle of said ridge being:

1.  $228^{\circ} 08' 30''$ —957.20 feet. Thence following down along the middle of ridge between the

lands of Luluku and Keaahala, the direct azimuth and distance between points on middle of said ridge being:

2.  $258^{\circ} 00'$ —300.00 feet;
3.  $47^{\circ} 28'$ —1330.30 feet along remainder of the land of Luluku to the middle of ridge between the lands of Luluku and Moanalua. Thence following down along the middle of ridge between the lands of Luluku and Moanalua, the direct azimuth and distance between points on middle of said ridge being:
4.  $172^{\circ} 30'$ —199.93 feet to the point of beginning and containing an area of 5.3 acres, and as delineated on 14th Naval District Drawing No. OA-N1-773. [624]

#### PARCEL 14

Land Situated at Moanalua, Honolulu, Oahu,  
T. H.

Being a Portion of Lot R of Land Court Application 1074.

Beginning at the Northeast corner of this parcel of land, on the boundary between the lands of Moanalua, Heeia and Luluku, being also the Northeast corner of Lot R of Land Court Application 1074, and at the Southeast Corner of Lot Q-3 of Land Court Application 1100, the coordinates of which referred to Government Survey Triangulation Station "Heeia" being 17,898.75 feet South and 504.03 feet West, and running by azimuths measured clockwise from true South:

Following up along the middle of ridge between the lands of Luluku and Moanalua, the direct azimuth and distance between points, on middle of said ridge being:

1.  $352^{\circ} 30'$ —199.93 feet;
2.  $127^{\circ} 35'$ —515.84 feet along remainder of Lot R of Land Court Application 1074 to the middle of ridge between the lands of Moanalua and Heeia. Thence following along the middle of ridge between the lands of Moanalua and Heeia, the direct azimuth and distance between points on middle of said ridge being:
3.  $286^{\circ} 55'$ —400.00 feet to the point of beginning and containing an area of 1.0 acre, and as delineated on 14th Naval District Drawing No. OA-N1-773.

/s/ R. M. TOWILL,

Registered Professional Surveyor Certificate Number 151.

Honolulu, T. H., October 22, 1943.

[Endorsed]: Filed Oct. 30, 1944. [625]

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[Title of District Court and Cause No. 540.]

### DECLARATION OF TAKING

Whereas, pursuant to the Acts of Congress approved March 27, 1942 (Public Law 507, 77th Congress), and April 28, 1942 (Public Law 528, 77th Congress), the above styled condemnation proceeding has been instituted.

Now, Therefore, pursuant to the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), I, Secretary of the Navy, do hereby make and cause to be filed this declaration of taking, and by virtue of authority thereof do hereby state that the lands selected for acquisition aggregate 124.914 acres, more or less, in Haiku Valley, Heeia, [627] Koolaupoko, Oahu, Territory of Hawaii, more particularly described in Exhibit "A" attached hereto and made a part hereof, and delineated as Parcels 6, 7, 8, 9, 10, 13 and 14 on a map entitled "Boundary Survey of Haiku Radio Station," designated as 14th N.D. Dwg. No. OA-N1-773, revised May 2, 1945, attached hereto as Exhibit "B" and made a part hereof.

And I do declare said lands to be taken under the authority of the aforesaid Acts of Congress; that the use to which said lands are to be put is for a radio station, and for other Naval purposes, as authorized by said Acts.

And I do further declare that the estate hereby taken in said lands for the public use aforesaid is title in fee simple, subject to all existing rights of the City and County of Honolulu in and to the rights of way described in Exhibit "A" and delineated on Exhibit "B" at Easements "A," "B," and "C" for the purpose of a road, and for the purpose of constructing, operating, maintaining, inspecting, repairing and removing water pipe lines under and across the same.

And I, Secretary of the Navy, do hereby state that the sum of money estimated by me to be just

compensation for said lands and all improvements thereon and appurtenances thereunto belonging, is ten thousand two hundred fifty-three dollars (\$10,253.00), which sum is hereby deposited into the registry of the court for the use and benefit of the persons entitled thereto, and that the amounts of just compensation for said lands and improvements thereon, which are hereby taken, are shown on Schedule "A" attached hereto and made a part hereof.

I am of the opinion that the ultimate award for the taking of said lands will be within the limits prescribed by [628] Congress.

In Witness Whereof, the petitioner, by and through the Secretary of the Navy, has caused this declaration of taking to be signed on the 6th day of September, 1945, in the City of Washington. District of Columbia.

UNITED STATES OF  
AMERICA,

By /s/ JAMES FORRESTAL.

SCHEDULE "A"

The names of the persons having title to or other interest in the lands described in the within declaration of taking, and the amounts estimated to be fair compensation for each respective ownership, including all improvements thereon, are as follows:

Name of Owner	Parcel	Acres	Estimated Just Compensation
Harold K. L. Castle	6	3.352	\$ 150.00
Trustees of B. P. Bishop Est.	7	110.112	9,500.00
Harold K. L. Castle	8	1.950	100.00
Mary Wong Yuen Chong	9	1.800	500.00
Trustees of B. P. Bishop Est.	10	1.400	1.00
Harold K. L. Castle	13	5.300	1.00
Trustees of Samuel M. Damon Estate	14	1.000	1.00
Total		124.914	\$10,253 00

[Printer's Note]: Exhibit "A" is the same as Exhibit "A" set out on pages 329-338 with exception of last paragraph of Parcel 7 which reads as follows: "Subject to rights-of-way over easements as shown and designated on maps of Land Court Application 1100 and also subject to Easements B and C as delineated on 14th Naval Dist. Drawing OA-N1-773."

EASEMENT "A"

Description of Easement for Main Water Supply Line and Roadway Land Situated in Haiku Valley, Heeia, Koolaupoko, Oahu, T. H.

Being a Portion of Lot E of Land Court Application 1342.

Beginning at the Southwest corner of this easement, being also the Southwest corner of Lot E of Land Court Application 1342, the coordinates of which referred to Government Survey Triangu-

lation Station "Heeia" being 13,984.61 feet South and 2,142.54 feet West, and running by azimuths measured clockwise from true South:

1.  $130^{\circ} 30'$ —27.93 feet along the boundary of Lot Q-3 of Land Court Application 1100;
2.  $267^{\circ} 59'$ —23.04 feet along a remainder of Lot E of Land Court Application 1342;
3.  $268^{\circ} 55'$ —113.76 feet along a remainder of Lot E of Land Court Application 1342;
4.  $257^{\circ} 02'$ —105.52 feet along a remainder of Lot E of Land Court Application 1342;
5.  $278^{\circ} 02'$ —58.29 feet along a remainder of Lot E of Land Court Application 1342;
6.  $278^{\circ} 07'$ —8.11 feet along a remainder of Lot E of Land Court Application 1342 to the Easterly boundary of Lot E of Land Court Application 1342;
7.  $36^{\circ} 30'$ —22.75 feet along the Easterly boundary of Lot E of Land Court Application 1342;
8.  $98^{\circ} 02'$ —51.87 feet along a remainder of Lot E of Land Court Application 1342;
9.  $77^{\circ} 02'$ —66.92 feet along a remainder of Lot E of Land Court Application 1342;
10.  $86^{\circ} 30'$ —154.30 feet along the Southerly boundary of Lot E of Land Court Application 1342 to the point of beginning and containing an area of 5,281 square feet. [641]

#### EASEMENT "B"

Description of Easement Twenty (20) Feet Wide  
Situated in Haiku Valley, Heeia, Koolaupoko,  
for Main Water Supply Line and Roadway Land  
Oahu, T. H.

Being a Portion of Lot Q-2 of Land Court Application 1100.

Description of Base Line of Main Water Supply Line and Roadway Which is on an offset of Five (5) Feet North from the Southerly Boundary of this Easement and on an Offset of Fifteen (15) Feet South From the Northerly Boundary of This Easement.

Beginning at the Westerly end of this easement, on the Easterly boundary of Lot E of Land Court Application 1342, the coordinates of which referred to Government Survey Triangulation Station "Heeia" being 13,962.84 feet South and 1,868.57 feet West, and running by azimuths measured clockwise from true South:

1.  $278^{\circ} 07'$ — 40.80 feet;
2.  $268^{\circ} 32'$ —284.40 feet;
3.  $295^{\circ} 38'$ —177.40 feet;
4.  $273^{\circ} 54'$ —116.70 feet;
5.  $266^{\circ} 17'$ — 72.00 feet;
6.  $267^{\circ} 01'$ —137.10 feet;
7.  $248^{\circ} 00'$ —210.20 feet;
8.  $200^{\circ} 31'$ —146.50 feet;
9.  $251^{\circ} 58'$ —201.90 feet;
10.  $227^{\circ} 16'$ — 82.30 feet;
11.  $228^{\circ} 42'$ —294.35 feet;
12.  $232^{\circ} 36'$ —120.00 feet;
13.  $233^{\circ} 43'$ —216.80 feet;
14.  $266^{\circ} 53'$ —101.90 feet;

Area—1.008 Acres.

[642]

## EASEMENT "C"

Description of Easement for Main Water Supply Line and Roadway Land Situated in Haiku Valley, Heeia, Koolaupoko, Oahu, T. H.

Being a Portion of Lot Q-2 of Land Court Application 1100.

Beginning at the Southwest corner of this easement, on the boundary of Lot Q-3 of Land Court Application 1100, the coordinates of which referred to Government Survey Triangulation Station "Heeia" being 13,985.25 feet South and 2,117.76 feet West, and running by azimuths measured clockwise from true South:

1.  $179^{\circ} 52'$ —2.16 feet along the Easterly boundary of Lot Q-3 of Land Court Application 1100;
2.  $266^{\circ} 30'$ —129.48 feet along the Southerly boundary of Lot E of Land Court Application 1342;
3.  $77^{\circ} 02'$ —36.97 feet along a remainder of Lot Q-2 of Land Court Application 1100;
4.  $88^{\circ} 55'$ —93.22 feet along a remainder of Lot Q-2 of Land Court Application 1100 to the point of beginning and containing an area of 494 square feet.

[Endorsed]: Filed Oct. 5, 1945. [643]

[Title of District Court and Cause No. 540.]

MOTION FOR ORDER AMENDING  
PETITION IN CONDEMNATION

Now comes the Petitioner, United States of America, by its attorney, Charles F. Rathbun, Special Assistant to the Attorney General, and moves that this Court enter an order amending the Petition in Condemnation herein by striking Exhibits "A" and "B" attached to said Petition and substituting therefor Exhibits "C" and "D", hereto attached as a part of said Petition, and by striking from said Petition all references to Exhibits "A" and "B" and substituting wherever said Exhibits "A" and "B" are mentioned in said Petition the designation Exhibits "C" and "D", and by striking from said Petition all of Paragraph III and substituting therefore a new Paragraph III as follows:

"That the estate sought to be taken in said lands for the public use aforesaid is title in fee simple, subject to all existing rights of the City & County of Honolulu in and to the rights of way described in Exhibit "C" and delineated on Exhibit "D" as easements "A", "B" and "C" for the purpose of a road, and for the purpose of constructing, operating, maintaining, inspecting, repairing, and removing water pipelines under and across the same."

Petitioner states that it is necessary that the

Petition herein be amended to more accurately define the estate being taken.

Dated: Honolulu, T. H., this 5th day of October, 1945.

UNITED STATES OF  
AMERICA,

By /s/ CHARLES F. RATHBUN,  
Special Assistant to the  
Attorney General.

[Printer's Note]: Exhibit "C" is the same as  
Exhibit "A" set out at pages 329-338.

[Endorsed]: Filed Oct. 15, 1945. [646]

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[Title of District Court and Cause No. 540.]

ORDER AMENDING PETITION IN  
CONDEMNATION

This matter coming on to be heard, upon the Motion of the Petitioner herein to amend Petition in Condemnation in the above cause, and it appearing that it is necessary to more accurately define the estate being taken in the land described in said Petition,

It Is Ordered:

That the Petition in Condemnation be amended by striking therefrom Exhibits "A" and "B", attached thereto, and substituting therefore as a part of said Petition Exhibits "C" and "D" attached to the Motion this day filed herein, asking for an

Order Amending the Petition, and by striking from said Petition all references to Exhibits "A" and "B" and substituting wherever said Exhibits "A" and "B" are mentioned in said Petition the designation Exhibits "C" and "D" and by striking all of Paragraph III of said Petition, substituting therefore a new Paragraph III as set forth in the said Motion this day filed herein, asking for an Order Amending the Petition in Condemnation **herein.**

Dated: Honolulu, T. H., this 5th day of October, 1945.

/s/ J. FRANK McLAUGHLIN,  
Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed Oct. 5, 1945. [659]

In the District Court of the United States  
for the District of Hawaii

October Term 1945

Civil No. 540

UNITED STATES OF AMERICA,

Petitioner,

vs.

124.914 acres of land, more or less, situate in Haiku  
Valley, Heeia, Koolaupoko, Oahu, Territory of  
Hawaii; Harold K. L. Castle, et al.,

Defendants.

### ORDER AND JUDGMENT ON DECLARATION OF TAKING

It appearing that on October 30, 1944, the United States of America filed a Petition for Condemnation of certain lands described and shown in said Petition herein; and

It further appearing that the said Petition for Condemnation has been amended pursuant to an Order of the Court this day entered herein; and

It further appearing that there was filed herein on the 5th day of October, 1945, in the above cause, a Declaration of Taking signed by James Forrestal, Secretary of Navy, under and pursuant to the provisions of the Act of Congress approved March 27, 1942 (Public Law 507, 77th Congress), the Act of Congress approved April 28, 1942 (Public Law 528, 77th Congress), and the Act of Congress approved

February 26, 1931 (46 Stat. 1421) declaring taken the estates and interests as set forth in said Declaration of Taking and as shown on Exhibits "A" and "B" attached to the said Declaration of Taking and on Exhibits "C" and "D" attached to the Petition herein as amended; that the public uses of said lands are those described in the said Declaration of Taking; and that the said Declaration of Taking sets forth the estimate of just compensation made pursuant to law and that [660] contemporaneously with the filing of said Declaration of Taking there was deposited in the registry of this Court for the use and benefit of the persons entitled thereto the sum of ten thousand two hundred fifty-three and no/100 dollars (\$10,253.00).

It Is Ordered, Adjudged and Decreed that by virtue of the filing of said Declaration of Taking and the deposit of said money, title to the estates and interests in said lands thus shown on Exhibits "A" and "B" attached to the said Declaration of Taking be and the same is hereby indefeasibly vested in the United States of America, subject to the conditions and reservations set forth in said Declaration of Taking and described and delineated on Exhibits "A" and "B" attached to said Declaration of Taking.

It Is Further Ordered that a copy of this Order be promptly served by the United States Marshal upon each of the defendants in this cause having an interest in this proceeding. The Marshal is further ordered to post a copy hereof in a conspicuous

place on the premises and to forthwith make due return of his said service to this Court.

Dated: Honolulu, T. H., this 5th day of October, 1945.

(Seal)           /s/ J. FRANK McLAUGHLIN,  
Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed Oct. 5, 1945. [661]

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[Title of District Court and Cause No. 540.]

ANSWER OF HONOLULU PLANTATION  
COMPANY

One of the Defendants Above Named

Comes now Honolulu Plantation Company, a corporation, organized under the laws of the State of California, and doing business in the Territory of Hawaii, one of the defendants in the above entitled cause, and for answer to the petition filed herein says:

I.

That it has neither knowledge or information sufficient to form a belief as to the allegations set forth and contained in Paragraphs I, III, IV, V, VI and VII of said petition, and therefore it neither admits nor denies the same but leaves the petitioner to its proof thereof.

II.

That it admits the allegations contained in Paragraph II of said petition.

## III.

That with respect to the allegations of said petition that it claims an interest in the property described in said petition this defendant admits the same and alleges that at the time of the filing of said petition and until judgment or order was entered on [663] declaration of taking filed in said causes it was the owner of an interest in the lands and in some of the improvements thereon and also admits that its lessor has an interest in the lands described in said petition which are under lease to this defendant; that the lease creating such interest and estate will be submitted to the Court on the trial of said causes.

And this defendant further alleges as follows:

That for and during a period of over forty years this defendant has been continuously operating and conducting and is now operating and conducting a sugar mill and plantation at Aiea in the District of Ewa, Island of Oahu, T. H., and has been at all times during said period and now is engaged in the business of growing sugar cane and manufacturing sugar therefrom;

That most of the acreage of land taken, by reason of the fertility of the soil thereon, their low elevation, and the comparatively small expense with which they can be irrigated, is peculiarly adapted to the cultivation and growth of sugar cane, and that this defendant was at the time of the filing of the petition in this cause and until the date fixed for the surrendering of possession by the judgment or order on the Declaration of Taking entered

in this cause and for many years prior thereto had been profitably using said lands for the cultivation and growth of sugar cane;

That the lands included within the area sought to be condemned which are held by this defendant under lease as aforesaid have a special and enhanced value by reason of the establishment by this defendant of a sugar mill and works, in close proximity to said lands, for the manufacture of sugar from cane grown and cultivated thereon and on other lands owned and/or leased by this defendant and by reason of the development by this defendant of a water supply for the irrigation of said lands, and other lands as aforesaid by means of artesian wells, pumping machinery and otherwise;

That for the purpose of cultivating the sand lands, this defendant has constructed improvements thereon;

That the parcel of land sought to be condemned by said petition in which this defendant has leasehold interest was at the time of the filing of the said petition in this cause and until judgment or order was entered on Declaration of Taking filed in this cause, and for many years prior thereto had been, occupied and cultivated by this defendant as integral parts of the sugar plantation operated and conducted by it at Aiea aforesaid and in connection with other large and contiguous tracts situated outside of the lands described in said petition but comprised within the said plantation and demised to this defendant by a number of leases and that by the taking of said lands described in the said

petitions the integrity of said sugar plantation will be destroyed and the unitary value of the leasehold interests and estates of this defendant in such other and contiguous tracts of land will be greatly impaired and diminished.

Wherefore this defendant prays (1) that the damages suffered by this defendant by reason of the taking of the lands and properties described in said petitions may be determined and the amount thereof be awarded to and paid to this defendant, and (2) for such other and general relief as may be meet and proper in the premises.

Dated: Honolulu, T. H., June 18, 1946.

HONOLULU PLANTATION  
COMPANY,

By VITOUSEK, PRATT & WINN,  
Its Attorneys,  
Defendant above named.

[Endorsed]: Filed June 18, 1946. [665]

In the United States District Court for the  
District of Hawaii

October Term 1944

Civil No. 544

UNITED STATES OF AMERICA,

Petitioner,

vs.

317.705 acres of land, more or less, situate at Moanalua, Honolulu, Oahu, Territory of Hawaii; JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR and JOHN EDWARD RUSSELL, Trustees under the Will and of the Estate of Samuel M. Damon; HONOLULU PLANTATION COMPANY, an Hawaiian corporation; CITY AND COUNTY OF HONOLULU; TERRITORY OF HAWAII; and all other persons, companies or corporations, either known or unknown, who claim to have or own any right, title or interest of any character whatever in said land,

Defendants.

### PETITION FOR CONDEMNATION

To the Honorable, the Presiding Judges of the  
United States District Court for the District  
of Hawaii:

Now comes the United States of America, by Robert S. Tarnay, Special Assistant to the Attorney General, acting under the instructions of the Attorney General of the United States and at the request of the Secretary of Navy and respectfully represents to the Court:

#### I.

That this proceeding is instituted under the authority of divers and Sundry Acts of Congress, among them the following:

The Act of Congress approved February 7, 1942 (Public Law 441 - 77th Congress)

The Act of Congress approved March 27, 1942 (Public Law 507 - 77th Congress) [666]

and that the Secretary of Navy, acting under authority vested in him by law has determined that it is necessary that the United States of America acquire by condemnation, by judicial process, certain lands more particularly described on Exhibits "A" and "A-1", hereto annexed and made parts hereof as though set forth at length and shown upon a map marked Exhibit "B", also attached hereto.

## II.

That the lands sought to be condemned are located at Moanalua, Honolulu, Oahu, Territory of Hawaii, and lie wholly within the jurisdiction of this Court.

## III.

That the estate sought to be condemned in this action is the fee simple title, together with all improvements thereon and appurtenances thereunto belonging, subject to existing public utility easements and power transmission lines, together with the right of ingress and egress for the purposes of inspecting, maintaining and repairing said power lines for so long as the easement is used for such purposes and subject to such rules and regulations as are promulgated by the United States for the security of the Naval reservation; reserving all existing fresh water mains and appurtenances thereunto belonging in their present location, to-

gether with right of ingress and egress for the purpose of inspecting said water mains for so long as said mains are used for such purposes and subject to such rules and regulations as are promulgated for the security of the Naval reservation; said lands to be used for a Naval Hospital and a Marine Transient Center and Storage Area and other military and Naval purposes.

#### IV.

That John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon; Honolulu Plantation Company, an Hawaiian corporation; City and County of Honolulu; Territory of Hawaii, and [667] all other persons, companies or corporations, either known or unknown, who claim to have or own any right, title or interest of any character whatever in said land, are made defendants herein.

#### V.

That the Secretary of Navy of the United States has determined that the utmost haste in expediting this project is vital to the War purposes of the United States and that he has, therefore, determined that possession of said lands, to the extent of the interest to be acquired therein, is necessary by the United States and that certain and adequate provisions have been made for the payment of just compensation which may be adjudged due for the condemnation of the lands described and shown on Exhibits "A", "A-1" and "B".

That the petitioner has been in possession of

Parcels D-2 and D-3 from and since September 11, 1943, and September 27, 1943, respectively, pursuant to rights of entry.

Wherefore, your petitioner prays this Honorable Court to take jurisdiction of this cause and enter all orders, judgments and decrees necessary to determine title of said real estate condemned, or any part thereof, and to fix and determine that the continued possession of the lands identified in Paragraph V is necessary for the War and Naval purposes of the United States; that upon payment into the registry of this Court for the use of the persons entitled thereunto of the sum adjudged to be full compensation for the condemnation of said land, that title to said land be vested in the United States of America, in fee simple, subject to the exceptions set forth in Paragraph III, and that the Court make distribution of the final awards among the persons entitled thereto as expeditiously as may be and for such other further relief as to the Court may seem just and proper in the premises. [668]

UNITED STATES OF  
AMERICA,

By /s/ CHARLES F. RATHBUN,  
Special Assistant to the  
Attorney General.

By /s/ ROBERT S. TARNAY,  
Special Assistant to the  
Attorney General.

(Duly Verified.) [669]

## EXHIBIT "A"

## PARCEL D-2

Being a portion of Lot E of Land Court Application 1074 at Moanalua, Honolulu, Oahu, T. H., also covered under Certificate of Title No. 20,266.

Beginning at the West corner of this parcel of land, on the boundary between the lands of Moanalua (Land Court Application 1074) and Halawa (Land Court Application 966), and on the North-east side of Kamehameha Highway, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 5205.00 feet South and 8992.65 feet West and thence running by azimuths measured clockwise from True South:

1.  $226^{\circ} 59'$ —1327.46 feet along Lot 1-A of Land Court Application 966, along Parcel E-2;
2.  $359^{\circ} 01' 30''$ —166.20 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
3.  $313^{\circ} 35'$ —378.66 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
4.  $342^{\circ} 51' 30''$ —299.22 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
5.  $353^{\circ} 39' 30''$ —173.96 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
6.  $339^{\circ} 20' 30''$ —440.75 feet along the remainder

- of Lot E of Land Court Application 1074,  
along Parcel D-1;
7.  $320^{\circ} 04' 30''$ —385.00 feet along the remainder  
of Lot E of Land Court Application 1074,  
along Parcel D-1;
  8.  $336^{\circ} 40'$ —238.42 feet along the remainder of  
Lot E of Land Court Application 1074, along  
Parcel D-1;
  9.  $348^{\circ} 21' 30''$ —102.09 feet along the remainder  
of Lot E of Land Court Application 1074,  
along Parcel D-1;
  10.  $327^{\circ} 54'$ —304.63 feet along the remainder of  
Lot E of Land Court Application 1074, along  
Parcel D-1;
  11.  $288^{\circ} 14' 30''$ —226.57 feet along the remainder  
of Lot E of Land Court Application 1074,  
along Parcel D-1;
  12.  $303^{\circ} 13' 30''$ —248.58 feet along the remainder  
of Lot E of Land Court Application 1074,  
along Parcel D-1;
  13.  $25^{\circ} 49'$ —1766.94 feet along the remainder of  
Lot E of Land [670] Court Application 1074,  
along Parcel D-3;
  14.  $124^{\circ} 30'$ —1011.56 feet along the new mauka  
line of Kamehameha Highway, said line estab-  
lished by Territory of Hawaii Condemnation  
Law No. 17049;
  15. Thence along the new mauka line of Kame-  
hameha Highway, said line established by Ter-  
ritory of Hawaii Condemnation Law No. 17049  
on a curve to the right with a radius of 1205.86

feet, the direct azimuth and distance being 146° 27' 30" 901.82 feet;

16. 168° 25'—1774.38 feet along the new mauka line of Kamehameha Highway, said line established by Territory of Hawaii Condemnation Law No. 17049 to the point of beginning and containing an area of 117.135 acres. [671]

### PARCEL D-3

Being portions of Lots E, G, H, J and W of Land Court Application 1074, at Moanalua, Honolulu, Oahu, T. H. (also covered under Certificate of Title No. 20,266).

Beginning at a point on the North boundary of this parcel of land, being also the most Westerly corner of Parcel D-6, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 8298.51 feet South and 1945.23 feet West and thence running by azimuths measured clockwise from True South:

1. 276° 20' 40"—44.90 feet along the remainder of Lot H of Land Court Application 1074, along Parcel D-6;
2. 9° 04'—802.03 feet along the remainders of Lots H and G of Land Court Application 1074, along Parcel D-4;
3. 12° 29'—288.52 feet along the remainder of Lot G of Land Court Application 1074, along Parcel D-4;
4. Thence on a curve to the right with a radius of 50.00 feet, along the remainder of Lot G

of Land Court Application 1074, along Parcel D-4, the direct azimuth and distance being  $55^{\circ} 46' 10''$  68.56 feet;

5.  $99^{\circ} 03' 20''$ —4531.04 feet along the new mauka line of Kamehameha Highway, said line established by Territory of Hawaii Condemnation Law No. 17049;
6. Thence still along the new mauka line of Kamehameha Highway, said line established by Territory of Hawaii Condemnation Law No. 17049 on a curve to the right with a radius of 2262.15 feet, the direct azimuth and distance being  $111^{\circ} 46' 40''$  996.36 feet;
7.  $124^{\circ} 30'$ —191.62 feet along the new mauka line of Kamehameha Highway, said line established by Territory of Hawaii Condemnation Law No. 17049;
8.  $205^{\circ} 49'$ —1766.94 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-2; [672]
9.  $289^{\circ} 38' 30''$ —380.00 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
10.  $269^{\circ} 04'$ —153.58 feet along the remainder of Lot E of Land Court Application 1074; along Parcel D-1;
11.  $296^{\circ} 09'$ —274.03 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
12.  $267^{\circ} 21' 30''$ —252.62 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;

13.  $313^{\circ} 50'$ —198.56 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
14.  $244^{\circ} 19' 30''$ —162.60 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
15.  $232^{\circ} 01' 30''$ —238.58 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
16.  $339^{\circ} 07'$ —143.45 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
17.  $280^{\circ} 33'$ —73.67 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
18.  $212^{\circ} 32' 30''$ —156.57 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
19.  $293^{\circ} 29'$ —143.57 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
20.  $2^{\circ} 36'$ —81.96 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
21.  $346^{\circ} 12'$ —241.81 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
22.  $277^{\circ} 57'$ —196.66 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
23.  $229^{\circ} 20' 30''$ —281.42 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;

24.  $321^{\circ} 19'$ —184.71 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
25.  $1^{\circ} 39' 30''$ —183.00 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
26.  $295^{\circ} 38'$ —140.00 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
27.  $237^{\circ} 25' 30''$ —432.28 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
28.  $341^{\circ} 45'$ —147.18 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1; [673]
29.  $4^{\circ} 37'$ —129.47 feet along the remainder of Lot E of Land Court Application 1074, along Parcel D-1;
30.  $326^{\circ} 26' 30''$ —496.50 feet along the remainders of Lots E and W of Land Court Application 1074, along Parcel D-1;
31.  $313^{\circ} 15'$ —435.82 feet along the remainders of Lots W and G of Land Court Application 1074, along Parcel D-1;
32.  $260^{\circ} 55' 30''$ —325.02 feet along the remainders of Lots G and J of Land Court Application 1074, along Parcel D-1;
33.  $318^{\circ} 23'$ —54.00 feet along the remainder of Lot J of Land Court Application 1074;
34.  $303^{\circ} 55'$ —89.95 feet along the remainder of Lot J of Land Court Application 1074;
35.  $283^{\circ} 56'$ —130.80 feet along the remainder of Lot J of Land Court Application 1074;

36. 272° 50' 50"—516.21 feet along the remainders of Lots J and H of Land Court Application 1074 to the point of beginning and containing an area of 200.57 acres.

[Endorsed]: Filed Nov. 28, 1944. [674]

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[Title of District Court and Cause No. 544.]

### DECLARATION OF TAKING

Whereas, pursuant to the Acts of Congress approved March 27, 1942 (Public Law 507, 77th Congress), and February 7, 1942 (Public Law 441, 77th Congress), the above styled condemnation proceeding has been instituted.

Now, Therefore, pursuant to the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), I, Secretary of the Navy, do hereby make and cause to be filed this declaration of taking, and by virtue of authority thereof do hereby state that the lands selected for acquisition aggregate 317.705 acres, more or less, at Moanalua, Oahu, Territory of Hawaii, which said lands are shown on a whiteprint entitled "Composite Boundary Map, Portions of the Lands of the Estate of Emma Kaleleonalani, deceased, at Halawa, Ewa, Oahu, T. H. [676] and the Estate of S. M. Damon, deceased, at Moanalua, Honolulu, Oahu, T. H." attached hereto as Exhibit "B" and made a part hereof. The lands are more particularly described in Exhibit "A" attached hereto and made a part hereof.

And I do declare the lands to be taken under

authority of the aforesaid acts of Congress; that the use to which the lands are to be put is for the establishment of a Naval Hospital, Marine Transient Center and Storage Area as authorized by said acts; and that the estate hereby taken in said lands for the public use aforesaid is in fee simple, subject to existing public utility easements for power transmission lines in favor of the Hawaiian Electric Company, Limited, together with the right of ingress and egress for the purposes of inspecting, maintaining and repairing said power lines for so long as the easements are used for such purposes and subject to such rules and regulations as are promulgated by the United States for the security of the Naval reservation; reserving, however, unto John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell as Trustees under the Will and of the Estate of Samuel M. Damon, Deceased, all existing fresh water mains and appurtenances thereunto belonging in their present location, together with the right of ingress and egress for the purposes of inspecting, maintaining and repairing said water mains and appurtenances thereunto belonging for so long as said mains are used for such purposes and subject to such rules and regulations as are promulgated by the United States for the security of the Naval reservation.

And I do hereby state that the sum of money estimated by me to be just compensation for all of said lands, improvements thereon, and appurtenances thereunto belonging is two hundred thirty-

three thousand four hundred three dollars and ninety-four cents (\$233,403.94), and is hereby deposited into the registry of the court for the use and benefit of the persons entitled thereto, and the amount of just compensation for said lands and improvements thereon, which are hereby taken are shown on [677] Schedule "A" which is attached hereto and made a part of this declaration of taking.

I am of the opinion that the ultimate award for the taking of said lands will be within the limits prescribed by Congress.

In Witness Whereof, the petitioner, by and through the Secretary of the Navy, has caused this declaration of taking to be signed and the seal of the Department of the Navy to be affixed hereto on the 8th day of January, 1945, in the City of Washington, District of Columbia.

UNITED STATES OF  
AMERICA,

(Seal) By /s/ JAMES FORRESTAL. [678]

**SCHEDULE "A"**

The names of the persons having title to or other interests in the lands described in the within declaration of taking, and the amounts estimated to be fair compensation for each respective ownership including all improvements thereon, are as follows:

Name of Owner	Parcel	Acres	Estimated Just Compensation
Samuel M. Damon Est.	D-2	117.135	\$ 63,253.00
Honolulu Plantation Company, Lessee			24,937.69
Samuel M. Damon Est.	D-3	200.570	104,111.00
Honolulu Plantation Company, Lessee			41,102.25
	Total	317.705	\$233,403.94

[Printer's Note]: Exhibit "A" is the same as Exhibit "A" set out at pages 358-364 of this printed Record.

[Endorsed]: Filed Jan. 29, 1945. [679]

In the United States District Court for the  
District of Hawaii

October Term 1944

Civil No. 544

UNITED STATES OF AMERICA,

Petitioner,

vs.

317.705 Acres of land, more or less, situate at  
Moanalua, Honolulu, Oahu, Territory of Ha-  
waii; John Waterhouse, Ernest Hay Wode-  
house, Walter Francis Frear and John Edward  
Russell, Trustees under the Will and of the  
Estate of Samuel M. Damon, et al.,

Defendants.

## ORDER AND JUDGMENT ON DECLARATION OF TAKING

It appearing that on November 28, 1944, the United States of America filed a petition for condemnation of certain lands described and shown on Exhibits "A" and "B", attached to the Declaration of Taking; and

It further appearing that there was filed on the 29th day of January, 1945, a Declaration of Taking signed by James Forrestal, Secretary of the Navy, under and pursuant to provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), declaring taken the full fee simple title,

together with all improvements thereon and appurtenances thereunto belonging, as limited in the Declaration of Taking; that the uses of said land and improvements thereon and appurtenances thereunto belonging are those described in the said Declaration of Taking and in the Petition; and that the said Declaration of Taking sets forth the estimate of just compensation made pursuant to law and that contemporaneously with the filing of said Declaration of Taking, there was deposited in the registry of this Court for the use of the persons entitled thereunto the sum of two hundred thirty-three thousand, four hundred three dollars and ninety-four cents (\$233,403.94),

It Is Ordered, Adjudged and Decreed that by virtue of the filing of said Declaration of Taking and the deposit of said money, fee simple title [686] to the lands described and shown on Exhibits "A" and "B", attached to the said Declaration of Taking, including all improvements and appurtenances upon said lands, as limited by the said Declaration of Taking, is indefeasibly vested in the United States of America; and

It Is Further Ordered that a copy of this Order be promptly served by the United States Marshal upon each of the defendants named and upon each and every person, company or corporation in possession of said land at the time possession was surrendered to the petitioner. The Marshal is further ordered to post a copy hereof in a conspicuous place

on the premises and to forthwith make due return of his said services to this Court.

Dated: Honolulu, T. H., this 29th day of January, 1945.

(Seal)           /s/ J. FRANK McLAUGHLIN,  
Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed Jan. 29, 1945. [687]

In the United States District Court for the  
District of Hawaii

October Term 1944

Civil No. 548

UNITED STATES OF AMERICA,

Petitioner,

vs.

63.725 acres of land, more or less, situate at Moanalua, Honolulu, Oahu, Territory of Hawaii; JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR and JOHN EDWARD RUSSELL, Trustees under the Will and of the Estate of Samuel M. Damon; HONOLULU PLANTATION COMPANY, an Hawaiian corporation; CITY AND COUNTY OF HONOLULU; TERRITORY OF HAWAII; and all other persons, companies or corporations, either known or unknown, who claim to have or own any right, title or interest of any character whatever in said land,

Defendants.

### PETITION FOR CONDEMNATION

To the Honorable, the Presiding Judges of the  
United States District Court for the District  
of Hawaii:

Now comes the United States of America, by Charles F. Rathbun and Robert S. Tarnay, Special Assistants to the Attorney General, acting under the instructions of the Attorney General of the United States and at the request of the Secretary of Navy and respectfully represents to the Court:

#### I.

That this proceeding is instituted under the authority of divers and Sundry Acts of Congress, among them the following:

The Act of Congress approved March 27, 1942 (Public Law 507 - 77th Congress)

The Act of Congress approved June 26, 1943 (Public Law 92 - 78th Congress)

The Act of Congress approved June 22, 1944 (Public Law 347 - 78th Congress)

and that the Secretary of Navy, acting under authority vested in him by law has determined that it is necessary that the United States of America acquire by condemnation, by judicial process, certain lands more particularly described [688] on Exhibits "A" and "A-1", hereto annexed and made parts hereof as though set forth at length and shown upon a map marked Exhibit "B", also attached hereto.

## II.

That the lands sought to be condemned are located at Moanalua, Honolulu, Oahu, Territory of Hawaii, and lie wholly within the jurisdiction of this Court.

## III.

That the estate sought to be condemned in this action is the fee simple title, subject to the following:

(a) Existing public utility easements for power transmission lines in favor of the Hawaiian Electric Company, Ltd., together with the right of ingress and egress for the purposes of inspecting, maintaining and repairing said power lines for so long as the easements are used for such purposes and subject to such rules and regulations as are

promulgated by the United States for the security of the Naval Reservation; and

(b) Reserving, however, unto John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell as Trustees under the Will and of the Estate of Samuel M. Damon, deceased, all existing fresh water mains and appurtenances thereunto belonging in their present location, together with the right of ingress and egress for the purposes of inspecting, maintaining and repairing said water mains and appurtenances thereunto belonging for so long as said mains and appurtenances are used for such purposes and subject to such rules and regulations as are promulgated by the United States for the security of the Naval Reservation.

Said lands are to be used for a security strip for the protection of Pearl Harbor and the Naval Reservation and for other Naval and military purposes.

#### IV.

That John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon; Honolulu Plantation Company, an Hawaiian corporation; City and County of Honolulu; Territory of Hawaii, and all other persons, companies or corporations, either known or unknown, who claim to have or own any right, title or interest of any character whatever in said land, are made defendants herein. [689]

## V.

That the Secretary of Navy of the United States had determined that the utmost haste in expediting this project is vital to the War purposes of the United States and that he has, therefore, determined that possession of said lands, to the extent of the interest to be acquired therein, is necessary by the United States and that certain and adequate provisions have been made for the payment of just compensation which may be adjudged due for the condemnation of the lands described and shown on Exhibits "A", "A-1" and "B".

That the petitioner has been in possession of Parcel D-13 from and since August 8, 1944.

Wherefore, your petitioner prays this Honorable Court to take jurisdiction of this cause and enter all orders, judgments and decrees necessary to determine title of said real estate condemned, or any part thereof, and to fix and determine that the continued possession of Parcel D-13 is necessary for the War and Naval purposes of the United States; that upon payment into the registry of this Court for the use of the persons entitled thereunto of the sum adjudged to be full compensation for the condemnation of said land, that title to said land be vested in the United States of America in fee simple, subject to the exceptions and reservations set forth in Paragraph III, and that the Court make distribution of the final awards among the persons entitled thereto as expeditiously as may be and for

such other further relief as to the Court may seem just and proper in the premises.

UNITED STATES OF  
AMERICA,

By /s/ CHARLES F. RATHBUN,  
Special Assistant to the  
Attorney General.

By /s/ ROBERT S. TARNAY,  
Special Assistant to the  
Attorney General.

(Duly Verified.) [690]

EXHIBIT "A"

PARCEL D-13

Being portions of Lots H and J of Land Court Application 1074, at Moanalua, Honolulu, Oahu, T. H. (also covered under Certificate of Title No. 20,266).

Beginning at the most Southerly corner of this parcel of land, being also the most Westerly corner of Parcel D-6, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 8298.51 feet South and 1945.23 feet West and thence running by azimuths measured clockwise from True South:

1. 92° 50' 50"—516.21 feet along the remainders of Lots H and J of Land Court Application 1074, along Parcel D-3;

2.  $103^{\circ} 56'$ —130.80 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-3;
3.  $123^{\circ} 55'$ —89.95 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-3;
4.  $138^{\circ} 23'$ —54.00 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-3;
5.  $153^{\circ} 32'$ —111.35 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-1;
6.  $176^{\circ} 44'$ —98.27 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-1;
7.  $194^{\circ} 20'$ —104.92 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-1;
8.  $211^{\circ} 41'$ —99.20 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-1;
9.  $191^{\circ} 22'$ —113.72 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-1;
10.  $161^{\circ} 59'$ —87.63 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-1;
11.  $172^{\circ} 31'$ —229.25 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-1;
12.  $191^{\circ} 46'$ —207.86 feet along the remainder of

- Lot J of Land Court Application 1074, along Parcel D-1;
13.  $213^{\circ} 00'$ —170.45 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-1;
  14.  $228^{\circ} 56'$ —75.00 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-1;
  15.  $298^{\circ} 06' 50''$ —286.32 feet along the remainder of Lot J of Land Court Application 1074, along the Southwest side of Alternate Highway from Honolulu to Schofield (100 feet wide);
  16. Thence along the remainder of Lot J of Land Court Application 1074, along the Southwest side of Alternate Highway from Honolulu to Schofield (100 feet wide) on a curve to the left with a radius of 1958.89 feet, the direct azimuth and distance being  $283^{\circ} 23' 20''$  996.34 feet;
  17.  $21^{\circ} 10'$ —398.79 feet along Lot H of Land Court Application 1074, along Parcel D-6;
  18.  $42^{\circ} 51'$ —283.80 feet along Lot H of Land Court Application 1074, along Parcel D-6;
  19.  $41^{\circ} 03'$ —321.00 feet along Lot H of Land Court Application 1074, along Parcel D-6;
  20.  $31^{\circ} 59' 30''$ —190.64 feet along the remainder of Lot H of Land Court Application 1074, along Parcel D-6 to the point of beginning and containing an area of 29.165 acres. [693]

## PARCEL D-14

Being portions of Lots H and J of Land Court Application 1074, Situated at Moanalua, Honolulu, Oahu, T. H. (also covered under Certificate of Title No. 20,266).

Beginning at the South corner of this parcel of land, being also the most Southeasterly corner of Lot G of Land Court Application 1074 and on the West side of Puuloa Road, the true azimuth traverse to a City and County Survey Street Monument set at the intersection of Kamehameha Highway and Puuloa Road being as follows:

(a)  $61^{\circ} 24' 01''$ —336.82 feet;

(b)  $64^{\circ} 09'$ —190.74 feet and the co-ordinates of said City and County Survey Street Monument referred to Government Survey Triangulation Station "Salt Lake" being 10,085.47 feet South and 1487.34 feet East and thence running by azimuths measured clockwise from True South from the above described initial point:

1.  $147^{\circ} 00'$ —485.39 feet along Lot G of Land Court Application 1074, along Parcel D-4;
2.  $95^{\circ} 28'$ —97.96 feet along Lot G of Land Court Application 1074, along Parcel D-4;
3.  $71^{\circ} 39'$ —171.50 feet along Lot G of Land Court Application 1074, along Parcel D-4;
4.  $93^{\circ} 14'$ —74.80 feet along Lot G of Land Court Application 1074, along Parcel D-4;
5.  $168^{\circ} 26'$ —337.76 feet along Lot G of Land Court Application 1074, along Parcel D-4;

6.  $189^{\circ} 04'$ —484.09 feet along the remainder of Lot H of Land Court Application 1074, along Parcel D-4;
7.  $276^{\circ} 20' 40''$ —88.06 feet along the remainder of Lot H of Land Court Application 1074, along Parcel D-6;
8.  $200^{\circ} 38' 30''$ —385.00 feet along the remainder of Lot H of Land Court Application 1074, along Parcel D-6 to a spike; [694]
9.  $296^{\circ} 48'$ —136.72 feet along the remainder of Lot H of Land Court Application 1074, along Parcel D-6 to a pipe;
10.  $325^{\circ} 24' 30''$ —125.58 feet along the remainder of Lot H of Land Court Application 1074, along Parcel D-6 to a pipe;
11.  $357^{\circ} 13'$ —92.00 feet along the remainder of Lot H of Land Court Application 1074, along Parcel D-6 to a pipe;
12.  $262^{\circ} 01'$ —110.23 feet along the remainder of Lot H of Land Court Application 1074, along Parcel D-6 to a pipe;
13.  $315^{\circ} 48' 30''$ —216.24 feet along the remainder of Lot H of Land Court Application 1074, along Parcel D-6 to a pipe;
14.  $30^{\circ} 40' 30''$ —87.71 feet along the remainder of Lot H of Land Court Application 1074, along Parcel D-6 to a pipe;
15.  $10^{\circ} 28'$ —340.98 feet along the remainder of Lot H of Land Court Application 1074, along Parcel D-6 to a pipe;
16.  $279^{\circ} 25' 30''$ —149.31 feet along the remainder

- of Lot H of Land Court Application 1074,  
along Parcel D-6 to a pipe;
17.  $251^{\circ} 43' 30''$ —180.37 feet along the remainder  
of Lot H of Land Court Application 1074,  
along Parcel D-6 to a pipe;
  18.  $177^{\circ} 25'$ —231.17 feet along the remainder of  
Lot H of Land Court Application 1074, along  
Parcel D-6 to a pipe;
  19.  $165^{\circ} 06' 30''$ —137.92 feet along the remainder  
of Lot H of Land Court Application 1074,  
along Parcel D-6 to a pipe;
  20.  $168^{\circ} 28'$ —213.58 feet along the remainder of  
Lot H of Land Court Application 1074, along  
Parcel D-6 to a pipe;
  21.  $173^{\circ} 16' 30''$ —85.08 feet along the remainder  
of Lot H of Land Court Application 1074,  
along Parcel D-6 to a pipe;
  22.  $91^{\circ} 06'$ —87.69 feet along the remainder of Lot  
H of Land Court Application 1074, along Par-  
cel D-6 to a pipe;
  23.  $73^{\circ} 02' 30''$ —117.89 feet along the remainder of  
Lot H of Land Court Application 1074, along  
Parcel D-6 to a pipe; [695]
  24.  $127^{\circ} 00' 30''$ —123.55 feet along the remainder  
of Lot H of Land Court Application 1074,  
along Parcel D-6 to a pipe;
  25.  $146^{\circ} 04'$ —69.39 feet along the remainder of  
Lot H of Land Court Application 1074, along  
Parcel D-6 to a pipe;
  26.  $201^{\circ} 06'$ —163.70 feet along the remainder of  
Lot H of Land Court Application 1074, along  
Parcel D-6 to a pipe;

27.  $157^{\circ} 22'$ —230.59 feet along the remainder of Lot H of Land Court Application 1074, along Parcel D-6 to a pipe;
28.  $246^{\circ} 25' 30''$ —209.34 feet along the remainder of Lot H of Land Court Application 1074, along Parcel D-6 to a pipe;
29.  $313^{\circ} 40' 30''$ —222.30 feet along the remainder of Lot H of Land Court Application 1074, along Parcel D-6 to a pipe;
30.  $198^{\circ} 46'$ —290.80 feet along the remainders of Lots H and J of Land Court Application 1074, along Parcel D-6 to a pipe;
31.  $164^{\circ} 17'$ —97.50 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-6 to a pipe;
32.  $195^{\circ} 31' 30''$ —55.92 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-6 to a pipe;
33.  $255^{\circ} 08' 30''$ —57.98 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-6 to a pipe;
34.  $282^{\circ} 20'$ —67.80 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-6 to a pipe;
35.  $190^{\circ} 49'$ —257.90 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-6 to a pipe;
36.  $216^{\circ} 56'$ —142.30 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-6 to a pipe;
37.  $226^{\circ} 04' 30''$ —153.24 feet along the remainder

- of Lot J of Land Court Application 1074, along Parcel D-6 to a pipe;
38.  $115^{\circ} 25'$ —238.48 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-6 to a pipe; [696]
  39.  $153^{\circ} 34'$ —223.39 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-6 to a nail driven in rock;
  40.  $173^{\circ} 50'$ —21.62 feet along the remainder of Lot J of Land Court Application 1074, along Parcel D-6;
  41.  $259^{\circ} 19'$ —800.87 feet along the remainder of Lot J of Land Court Application 1074;
  42.  $312^{\circ} 21' 30''$ —97.59 feet along the remainder of Lot J of Land Court Application 1074;
  43.  $42^{\circ} 21' 30''$ —354.96 feet along the West side of Puuloa Road;
  44. Thence along the West side of Puuloa Road, on a curve to the left with a radius of 911.92 feet, the direct azimuth and distance being  $35^{\circ} 39' 25''$  212.81 feet;
  45.  $28^{\circ} 57' 20''$ —802.54 feet along the West side of Puuloa Road;
  46. Thence along the West side of Puuloa Road, on a curve to the left with a radius of 795.25 feet; the direct azimuth and distance being  $14^{\circ} 38' 55''$  394.04 feet;
  47.  $00^{\circ} 20' 30''$ —864.65 feet along the West side of Puuloa Road;
  48. Thence along the West side of Puuloa Road, on a curve to the right with a radius of 1896.80

feet, the direct azimuth and distance being  $1^{\circ} 39' 20''$  86.98 feet;

49. Still along the West side of Puuloa Road, on a curve to the right with a radius of 855.36 feet, the direct azimuth and distance being  $26^{\circ} 42' 08''$  712.68 feet to the point of beginning and containing an area of 34.560 Acres.

[Endorsed]: Filed Jan. 18, 1945.

[697]

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[Title of District Court and Cause No. 548.]

### DECLARATION OF TAKING

Whereas, pursuant to the Acts of Congress approved March 27, 1942 (Public Law 507, 77th Congress), June 26, 1943 (Public Law 92, 78th Congress), and June 22, 1944 (Public Law 347, 78th Congress), the above styled condemnation proceeding has been instituted.

Now, Therefore, pursuant to the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), I, Secretary of the Navy, do hereby make and cause to be filed this declaration of taking, and by virtue of authority thereof do hereby state that the lands selected for acquisition aggregate 63.725 acres, more or less, [699] at Moanalua, Honolulu, Oahu, Territory of Hawaii, more particularly described in Exhibit "A" attached hereto and made a part hereof, and delineated as Parcels D-13 and D-14 on a map entitled, "Composite

Boundary Map", designated as 14th N. D. Dwg. No. OA-N1-942, attached hereto as Exhibit "B" and made a part hereof.

And I do declare said lands to be taken under the authority of the aforesaid Acts of Congress; that the use to which said lands are to be put is for a security strip for the protection of Pearl Harbor and the Naval Reservation and for other Naval and military purposes, as authorized by said Acts.

I do further declare that the estate hereby taken in said lands, together with all improvements and appurtenances thereto belonging, for the public use aforesaid, is title in fee simple, subject to the following:

(a) Existing public utility easements for power transmission lines in favor of the Hawaiian Electric Company, Ltd., together with the right of ingress and egress for the purposes of inspection, maintaining and repairing said power lines for so long as the easements are used for such purposes; and

(b) The reservation unto John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell as Trustees under the Will and of the Estate of Samuel M. Damon, deceased, of all existing fresh water mains and appurtenances thereunto belonging in their present location, together with the rights of ingress and egress for the purposes of inspecting, maintaining and repair-

ing said water mains and appurtenances thereunto belonging for so long as said mains and appurtenances are needed and used; and [700]

(c) An easement hereby reserved unto the fee owners, John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, as Trustees under the Will and of the Estate of Samuel M. Damon, deceased, their successors in trust, assigns, and permittees, for the erection, maintenance and operation of spheroidal gas storage tanks, over and upon that certain area of Parcel D-14, comprising 1.245 acres, described in Exhibit "A" and delineated upon Exhibit "B" as Easement No. 1, all for so long only as said area is used for such purposes, together with the right of ingress and egress thereto for the purpose of said easement, at such place and at such times as the Secretary of the Navy, or his duly authorized representative, shall specify. Said reservation is hereby made subject, however, to the restriction that no structure erected on said site shall exceed the height of 75 feet above the ground level.

And I, Secretary of the Navy, do hereby state that the sum of money estimated by me to be just compensation for said lands and all improvements thereon and appurtenances thereunto belonging, is Twenty Thousand Two Hundred and Thirty Dollars (\$20,230.00), which sum is hereby deposited into the registry of the court for the use and benefit of the persons entitled thereto.

The ostensible owners of the property are John Waterhouse, Ernest Hay Wodehouse, Walter Fran-

cis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased. [701]

I am of the opinion that the ultimate award for the taking of said lands will be within the limits prescribed by Congress.

In Witness Whereof, the petitioner, by and through the Secretary of the Navy, has caused this declaration of taking to be signed this 25th day of September, 1945, in the City of Washington, District of Columbia.

UNITED STATES  
OF AMERICA,

By /s/ JAMES FORRESTAL. [702]

[Printer's Note]: Exhibit "A" is the same as Exhibit "A" set out at pages 375-383 except second line of paragraph 49, page 383, reads: "a curve to the right with a radius of 885.36 feet."

EASEMENT 1

Beginning at the South corner of this parcel of land, being also the South corner of Lot J and the East corner of Lot H, on the Northwesterly side of Puuloa Road of Land Court Application 1074 and thence running by azimuths measured clockwise from True South:

1.  $115^{\circ} 30'$ —174.23 feet along Lot H;
2.  $198^{\circ} 46'$ —36.63 feet along the remainder of Lot J;
3.  $164^{\circ} 17'$ —97.50 feet along the remainder of Lot J;

4.  $195^{\circ} 31' 30''$ —55.92 feet along the remainder of Lot J;
5.  $255^{\circ} 08' 30''$ —57.98 feet along the remainder of Lot J;
6.  $282^{\circ} 20'$ —67.80 feet along the remainder of Lot J;
7.  $190^{\circ} 49'$ —43.34 feet along the remainder of Lot J;
8.  $298^{\circ} 57' 20''$ —168.63 feet along the remainder of Lot J;
9.  $28^{\circ} 57' 20''$ —250.00 feet along Puuloa Road to the point of beginning and containing an area of 1.245 Acres.

[Endorsed]: Filed Nov. 1, 1945.

[709]

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[Title of District Court and Cause No. 548.]

## MOTION OF ORDER AMENDING PETITION IN CONDEMNATION

Now comes the Petitioner, United States of America, by its attorney, Charles F. Rathbun, Special Assistant to the Attorney General, and moves that this Court enter an Order Amending the Petition in Condemnation herein by adding to Exhibits "A" and "A-1", attached to the Petition in Condemnation herein, the following.

### "EASEMENT 1

Beginning at the South corner of this parcel of land, being also the South corner of Lot J and the East corner of Lot H, on the Northwesterly side

of Puuloa Road of Land Court Application 1074 and thence running by azimuths measured clockwise from True South:

1.  $115^{\circ} 30'$ —174.23 feet along Lot H;
2.  $198^{\circ} 46'$ —36.63 feet along the remainder of Lot J;
3.  $164^{\circ} 17'$ —97.50 feet along the remainder of Lot J;
4.  $195^{\circ} 31' 30''$ —55.92 feet along the remainder of Lot J; [711]
5.  $255^{\circ} 08' 30''$ —57.98 feet along the remainder of Lot J;
6.  $282^{\circ} 20'$ —67.80 feet along the remainder of Lot J;
7.  $190^{\circ} 49'$ —43.34 feet along the remainder of Lot J;
8.  $298^{\circ} 57' 20''$ —168.63 feet along the remainder of Lot J;
9.  $28^{\circ} 57' 20''$ —250.00 feet along Puuloa Road to the point of beginning and containing an area of 1.245 Acres."

and by striking from said Petition Exhibit "B" attached to said Petition, and substituting therefore and making a part of said Petition Exhibit "C", hereto attached and made a part of this Motion, and by striking from said Petition in Condemnation all of Paragraph III and substituting therefore a new Paragraph III as a part of said Petition as follows:

"That the estate sought to be condemned in said lands, together with all improvements and appur-

tenances thereto belonging, is title in fee simple, subject to the following:

(a) Existing public utility easements for power transmission lines in favor of the Hawaiian Electric Company, Ltd., together with the right of ingress and egress for the purposes of inspection, maintaining and repairing said power lines for so long as the easements are used for such purposes; and

(b) The reservation unto John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell as Trustees under the Will and of the Estate of Samuel M. Damon, deceased, of all existing fresh water mains and appurtenances thereunto belonging in their present location, together with the right of ingress and egress for the purposes of inspecting, maintaining and repairing said water mains and appurtenances thereunto belonging for so long as said mains and appurtenances are needed and used; and [712]

(c) An easement hereby reserved unto the fee owners, John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, as Trustees under the Will and of the Estate of Samuel M. Damon, deceased, their successors in trust, assigns, and permittees, for the erection, maintenance and operation of spheroidal gas storage tanks, over and upon that certain area of Parcel D-14, comprising 1.245 acres, described in Exhibit "A" and delineated upon Exhibit "B" as Easement No. 1, all for so long only as said area is used for such purposes, together with the right

of ingress and egress thereto for the purpose of said easement, at such place and at such times as the Secretary of the Navy, or his duly authorized representative, shall specify. Said reservation is hereby made subject, however, to the restriction that no structure erected on said site shall exceed the height of 75 feet above the ground level."

Petitioner states that it is necessary that the Petition herein be amended to more accurately define the estate being taken.

Dated Honolulu, T. H., this 1st day of November, 1945.

UNITED STATES  
OF AMERICA,

(Seal) By /s/ CHARLES F. RATHBUN,  
Special Asst to the Atty Gen.

[Endorsed]: Filed Nov. 1, 1945. [713]

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[Title of District Court and Cause No. 548.]

ORDER AMENDING PETITION  
IN CONDEMNATION

This matter coming on to be heard on the Motion of the Petitioner herein to amend the Petition in Condemnation in the above cause, and it appearing that it is necessary to more accurately define the estate being taken in the land described in said Petition,

It Is Ordered:

That the Petition in Condemnation be amended by adding to Exhibits "A" and "A-1", attached

to the Petition in Condemnation herein, the following:

“EASEMENT 1

Beginning at the South corner of this parcel of land, being also the South corner of Lot J and the East corner of Lot H, on the Northwesterly side of Puuloa Road of Land Court Application 1074 and thence running by azimuths measured clockwise from True South:

1.  $115^{\circ} 30'$ —174.23 feet along Lot H;
2.  $198^{\circ} 46'$ —36.63 feet along the remainder of Lot J;
3.  $164^{\circ} 17'$ —97.50 feet along the remainder of Lot J;
4.  $195^{\circ} 31' 30''$ —55.92 feet along the remainder of Lot J;
5.  $255^{\circ} 08' 30''$ —57.98 feet along the remainder of Lot J; [715]
6.  $282^{\circ} 20'$ —67.80 feet along the remainder of Lot J;
7.  $190^{\circ} 49'$ —43.34 feet along the remainder of Lot J;
8.  $298^{\circ} 57' 20''$ —168.63 feet along the remainder of Lot J;
9.  $28^{\circ} 57' 20''$ —250.00 feet along Puuloa Road to the point of beginning and containing an area of 1.245 Acres.”

and by striking from said Petition Exhibit “B” attached to said Petition, and substituting therefore and making a part of said Petition Exhibit

“C”, attached to the Motion this day filed herein, asking for an Order Amending Petition in Condemnation, and by striking from said Petition in Condemnation all of Paragraph III and substituting therefore a new Paragraph III as a part of said Petition as follows:

“That the estate sought to be condemned in said lands, together with all improvements and appurtenances thereto belonging, is title in fee simple, subject to the following:

(a) Existing public utility easements for power transmission lines in favor of the Hawaiian Electric Co., Ltd., together with the right of ingress and egress for the purposes of inspection, maintaining and repairing said power lines for so long as the easements are used for such purposes; and

(b) The reservation unto John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell as Trustees under the Will and of the Estate of Samuel M. Damon, deceased, of all existing fresh water mains and appurtenances thereunto belonging in their present location, together with the right of ingress and egress for the purposes of inspecting, maintaining and repairing said water mains and appurtenances thereunto belonging for so long as said mains and appurtenances are needed and used; and [716]

(c) An easement hereby reserved unto the fee owners, John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, as Trustees under the Will and of the Estate of Samuel M. Damon, deceased, their successors in

trust, assigns, and permittees, for the erection, maintenance and operation of spheroidal gas storage tanks, over and upon that certain area of Parcel D-14, comprising 1.245 acres, described in Exhibit "A" and delineated upon Exhibit "B" as Easement No. 1, all for so long only as said area is used for such purposes, together with the right of ingress and egress thereto for the purpose of said easement, at such place and at such times as the Secretary of the Navy, or his duly authorized representative, shall specify. Said reservation is hereby made subject, however, to the restriction that no structure erected on said site shall exceed the height of 75 feet above the ground level."

Dated Honolulu, T. H., this 1st day of November, 1945.

(Seal)            /s/ D. E. METZGER,  
Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed Nov. 1, 1945.

[717]

In the District Court of the United States  
For the District of Hawaii

October Term, 1945

Civil No. 548

UNITED STATES OF AMERICA,

Petitioner,

vs.

63.725 ACRES OF LAND, more or less, situate at  
Moanalua, Honolulu, Oahu, Territory of Ha-  
waii; John Waterhouse, Ernest Hay Wode-  
house, Walter Francis Frear and John Edward  
Russell, Trustees under the Will and of the  
Estate of Samuel M. Damon; et al.,

Defendants.

ORDER AND JUDGMENT ON  
DECLARATION OF TAKING

It appearing that on January 18, 1945, the United States of America filed a Petition for Condemnation of certain lands described and shown in said Petition herein as amended; and

It further appearing that there was filed herein, on the 1st day of November, 1945, a Declaration of Taking signed by James Forrestal, Secretary of the Navy, under and pursuant to the provisions of the Act of Congress approved March 27, 1942 (Public Law 507, 77th Congress), the Act of Congress approved June 26, 1943 (Public Law 92, 78th Congress), the Act of Congress approved June 22, 1944 (Public Law 347, 78th Congress) and the Act of

Congress approved February 26, 1931 (46 Stat. 1421), declaring taken the estates and interests as set forth in said Declaration of Taking and as shown on Exhibits "A" and "B" attached to said Declaration of Taking; that the public uses for said lands are those described in said Declaration of Taking; and that the said Declaration of Taking sets forth the estimate of just compensation made pursuant to law and that contemporaneously with the filing of said Declaration of Taking there was deposited in the registry [718] of this Court for the use and benefit of the persons entitled thereto the sum of Twenty Thousand Two Hundred Thirty and No/100 Dollars (\$20,230.00).

It Is Ordered, Adjudged and Decreed that by virtue of the filing of said Declaration of Taking and the deposit of said money, title to the estates and interests in said lands thus shown on Exhibits "A" and "B", attached to said Declaration of Taking, be and the same is hereby indefeasibly vested in the United States of America, subject to the conditions and reservations set forth in said Declaration of Taking and described and delineated on Exhibits "A" and "B" attached to said Declaration of Taking.

It Is Further Ordered that a copy of this Order be promptly served by the United States Marshal upon each of the defendants in this cause having an interest in this proceeding. The Marshal is further ordered to post a copy hereof in a conspicuous

place on the premises and to forthwith make due return of his said service to this Court.

Dated Honolulu, T. H., this 1st day of November, 1945.

(Seal)            /s/ D. E. METZGER,  
Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed Nov. 1, 1945.

[719]

In the District Court of the United States  
for the District of Hawaii

October Term 1945

Civil No. 684

UNITED STATES OF AMERICA,

Petitioner,

vs.

29.891 ACRES OF LAND, more or less, in Moanahua and Halawa, Ewa, Oahu, Territory of Hawaii, Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, et al.,

Defendants.

### PETITION FOR CONDEMNATION

To the Honorable, the Presiding Judges of the United States District Court for the District of Hawaii:

Now comes the Petitioner, the United States of America, by Charles F. Rathbun, Special Assistant to the Attorney General, acting under the instructions of the Attorney General of the United States and at the request of the Secretary of the Navy of the United States and respectfully represents to the Court:

#### I.

That this proceeding is instituted under the authority of divers and sundry Acts of Congress, among them the following:

The Act of Congress approved March 27, 1942 (Public Law 507—77th Congress) as amended by

The Act of Congress approved December 20, 1944 (Public Law 509—78th Congress)

The Act of Congress approved February 7, 1942 (Public Law 441—77th Congress) and

The Act of Congress approved February 26, 1931 (46 Stat. 1421) [720]

and that the Secretary of the Navy, acting under authority vested in him by law, has determined that it is necessary that the United States of America acquire by condemnation, by judicial process, certain lands more particularly described in Exhibit "A" hereto annexed and made a part hereof as though set forth at length and shown upon maps marked Exhibits "B" and "C" also attached hereto and made a part hereof.

## II.

That the lands sought to be condemned are located in Moanalua and Halawa, Ewa, Oahu, Territory of Hawaii, and lie wholly within the jurisdiction of this Court.

## III.

That the estate sought to be condemned in this action together with all improvements (except such as are attached to the easements and reservations hereinafter set forth) and appurtenances thereto belonging, is title in fee simple, subject, however, to:

1. "As to Parcel D-15, the existing right of

the Hawaiian Electric Company, Limited, its successors and assigns, to operate, maintain and repair electric power transmission poles and wire lines, together with the right of ingress and egress for such purposes, over the right of way, the center-line of which over Parcel D-15 is indicated on Exhibit "B" attached hereto, as follows: "Center-line of Haw'n Electric Co.'s relocated pole line, installed May 26, 1944"; said right having been acquired by the said Hawaiian Electric Company, Limited, from the Trustees of the Estate of Samuel M. Damon, Deceased, by instrument dated 27 April 1945 and filed in the Office of the Assistant Registrar, Land Court Territory of Hawaii (Bureau of Conveyances) on 18 May 1945 as Document No. 78619 and noted on Certificate of Title No. 20,266.

2. As to Parcel D-15, the right hereby reserved unto Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, their successors in trust, assigns and permittees to use said land for roadway purposes, jointly with the United States of America, subject to the authority of the Secretary of the Navy and his duly authorized representatives to promulgate and enforce such rules and regulations relating to the exercise of such right that may be required for Naval security purposes.

3. The right hereby reserved unto:

(1) George Miles Collins, John Kirkwood Clarke, Frank Midkiff, Edwin Pauhaulani Murray, and Joseph Boyd Poindexter, as Trustees un-

der the Will and of the Estate of Bernice P. Bishop, Deceased, their successors in trust, assigns, and permittees, as to Parcel A; and [721]

(2) Charles M. Hite, Trustee under the Will and of the Estate of Emma Kaleleonalani, his successors in trust, assigns and permittees, as to Parcels B and E; and

subject to existing leasehold rights of Honolulu Plantation Company, to cross and recross said above described parcels by way of foot, vehicles or portable plantation railroad tracks, for so long only as said parties or their assigns other than the United States of America are fee owners of lands abutting on said parcels.

4. An easement hereby reserved unto the fee owner, Charles M. Hite, Trustee under the Will and of the Estate of Emma Kaleleonalani, his successors in trust, assigns, and permittees, subject to the existing leasehold rights of Honolulu Plantation Company, for railroad tracks and facilities over Parcel B, over and along the right of way described and shown as easement 1 in Exhibits "A" and "C", attached hereto and made a part hereof, for so long only as said right of way is used for said purposes." and said lands are to be used for the establishment of a military road from Camp Catlin to Aiea Barracks, and for other naval purposes.

#### IV.

That Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased; George Miles Collins, John Kirkwood

Clarke, Frank Midkiff, Edwin Pauhaulani Murray and Joseph Boyd Poindexter, Trustees under the Will and of the Estate of Bernice P. Bishop, deceased; Charles M. Hite, Trustee of Emma Kaleleonalani Estate; The Hawaiian Electric Company, Limited; Honolulu Plantation Company; City and County of Honolulu; Territory of Hawaii, and all other persons, companies or corporations, either known or unknown, who claim to have or own any right, title or interest of any character whatever in said lands are made defendants herein.

Wherefore, your petitioner prays this Honorable Court to take jurisdiction of this cause and enter all orders, judgments and decrees necessary to determine title of said real estate condemned, or any part thereof; that upon payment into the registry of this Court for the uses of the persons entitled thereto of the sum adjudged to be full compensation for the condemnation of said land, that title of said land be vested in the United States of America in fee simple, subject to the exceptions herein set forth, and that the Court make distribution of the final awards among the [722] persons entitled thereto as expeditiously as may be and for such other relief as to the Court may seem just and proper in the premises.

UNITED STATES OF  
AMERICA,

By /s/ CHARLES F. RATHBUN,  
Special Assistant to the  
Attorney General.

(Duly Verified.) [723]

## EXHIBIT A

## PARCEL A

Being a portion of R. P. 6717, L.C.Aw. 7712 and 8516 B to M. Kekuanaoa and Kanaikui at Halawa, Ewa, Oahu, T. H. Being a portion of Military Road from Aiea to Catlin (100 feet wide).

Beginning at the South corner of this strip of land, on the boundary of Lot 1-A of Land Court Application 966, the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 1370.44 feet North and 7404.36 feet West, and thence running by azimuths measured clockwise from True South:

1.  $160^{\circ} 27'$ —1515.96 feet along the remainder of R. P. 6717, L.C.Aw. 7712 and 8516 B to M. Kekuanaoa and Kanaikui;
2.  $185^{\circ} 03' 30''$ —46.56 feet along the remainder of R.P. 6717, L.C.Aw. 7712 and 8516 B to M. Kekuanaoa and Kanaikui, along United States Navy Reservation (Civil 535);
3.  $219^{\circ} 42'$ —93.79 feet along the remainder of R.P. 6717, L.C.Aw. 7712 and 8516 B to M. Kekuanaoa and Kanaikui, along United States Navy Reservation (Civil 535);
4.  $340^{\circ} 27'$ —1392.56 feet along the remainder of R.P. 6717, L.C. Aw. 7712 and 8516 B to M. Kekuanaoa and Kanaikui, to the boundary of Lot 1-A of Land Court Application 966;
5.  $357^{\circ} 25'$ —56.30 feet along Lot 1-A of Land Court Application 966, along United States Navy Parcel B;

6.  $345^{\circ} 10'$ —168.00 feet along Lot 1-A of Land Court Application 966, along United States Navy Parcel B;
7.  $76^{\circ} 40'$ —70.16 feet along Lot 1-A of Land Court Application 966, along United States Navy Parcel B to the point of beginning and containing an area of 3.523 Acres. [724]

### PARCEL B

Being a portion of Lot 1-A of Land Court Application 966 at Halawa, Ewa, Oahu, T. H. Being a portion of Military Road from Aiea to Catlin (100 feet wide).

Beginning at the South corner of this strip of land, being also the West corner of United States Navy Parcel D, the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 1826.79 feet South and 6428.27 feet West and thence running by azimuths measured clockwise from True South:

1.  $165^{\circ} 54' 50''$ —2012.68 feet along the remainder of Lot 1-A of Land Court Application 966:
2. Thence along the remainder of Lot 1-A of Land Court Application 966, on a curve to the left with a radius of 2814.93 feet, the direct azimuth and distance being  $160^{\circ} 29' 20''$  532.26 feet;
3.  $155^{\circ} 03' 50''$ —174.72 feet along the remainder of Lot 1-A of Land Court Application 966:
4. Thence along the remainder of Lot 1-A of Land Court Application 966 on a curve to the right

- with a radius of 5779.65 feet, the direct azimuth and distance being  $157^{\circ} 45' 25''$  543.12 feet;
5.  $160^{\circ} 27'$ —87.27 feet along the remainder of Lot 1-A of Land Court Application 966;
  6.  $256^{\circ} 40'$ —70.16 feet along R. P. 6717, L.C. Aw. 7712 and 8516 B to M. Kekuanaoa and Kanaikui, along United States Navy Parcel A;
  7.  $165^{\circ} 10'$ —168.00 feet along R. P. 6717, L.C. Aw. 7712 and 8516 B to M. Kekuanaoa and Kanaikui, along United States Navy Parcel A;
  8.  $177^{\circ} 25'$ —56.30 feet along R. P. 6717, L.C. Aw. 7712 and 8516 B to M. Kekuanaoa and Kanaikui, along United States Navy Parcel A;
  9.  $340^{\circ} 27'$ —300.95 feet along the remainder of Lot 1-A of Land Court Application 966;
  10. Thence along the remainder of Lot 1-A of Land Court Application 966, on a curve to the left with a radius of 5679.65 feet, the direct azimuth and distance being  $337^{\circ} 45' 25''$  533.72 feet;
  11.  $335^{\circ} 03' 50''$ —174.72 feet along the remainder of Lot 1-A of Land Court Application 966;
  12. Thence along the remainder of Lot 1-A of Land Court Application 966, on a curve to the right with a radius of 2914.93 feet, the direct azimuth and distance being  $339^{\circ} 36' 30''$  461.91 feet;
  13.  $354^{\circ} 50' 30''$ —28.24 feet along Exclusion 5 of Land Court Application 966, along United States Navy Parcel C;
  14.  $264^{\circ} 05' 30''$ —5.19 feet along Exclusion 5 of

Land Court Application 966, along United States Navy Parcel C;

15. Thence along the remainder of Lot 1-A of Land Court Application 966, on a curve to the right with a radius of 2914.93 feet, the direct azimuth and distance being  $345^{\circ} 18' 53.5''$  60.95 feet;
16.  $345^{\circ} 54' 50''$ —2001.84 feet along the remainder of Lot 1-A of Land Court Application 966;
17.  $69^{\circ} 43' 30''$ —100.59 feet along Exclusion 9 of Land Court Application 966, along United States Navy Parcel D to the point of beginning and containing an area of 7.778 Acres.

Subject, However, to Easement I

### PARCEL E

Being a portion of Lot 1-A of Land Court Application 966 at Halawa, Ewa, Oahu, T. H. Being a portion of Military Road from Aiea to Catlin (100 feet wide).

Beginning at the South corner of this strip of land, being also the West corner of United States Navy Parcel D-15, and on the Westerly boundary of the Lands of Moanalua (Land Court Application 1074) and Halawa (Land Court Application 966), the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 2625.32 feet South and 6227.90 feet West and thence running by azimuths measured clockwise from True South:

1.  $165^{\circ} 54' 50''$ —742.71 feet along United States

- Navy Parcel E-1, along the remainder of Lot 1-A of Land Court Application 966; [726]
2.  $249^{\circ} 58'$ —100.54 feet along Exclusion 9 of Land Court Application 966, along United States Navy Parcel D;
  3.  $345^{\circ} 54' 50''$ —697.85 feet along the remainder of Lot 1-A of Land Court Application 966;
  4.  $46^{\circ} 59'$ —114.26 feet along the Westerly boundary of the Land of Moanalua (Land Court Application 1074), along United States Navy Parcel D-15 to the point of beginning and containing an area of 1.654 Acres. [727]

### EASEMENT 1

(Railroad Right-of-Way, 40 feet wide)

Over, along, upon and across a portion of United States Navy Parcel "B" (Military Road from Aiea to Catlin, 100 feet wide) at Halawa, Ewa, Oahu, T. H. Being a portion of Lot 1-A of Land Court Application 966.

Beginning at the South corner of this strip of land, the true azimuth and distance from the South corner of United States Navy Parcel "B" (Military Road from Aiea to Catlin, 100 feet wide) being  $165^{\circ} 54' 50''$  1084.65 feet, and the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 774.76 feet South and 6692.25 feet West and thence running by azimuths measured clockwise from True South:

1.  $165^{\circ} 54' 50''$ —45.15 feet along the remainder of Lot 1-A of Land Court Application 966;
2.  $228^{\circ} 17'$ —112.86 feet along the remainder of Lot 1-A of Land Court Application 966; along the remainder of United States Navy Parcel "B";
3.  $345^{\circ} 54' 50''$ —45.15 feet along the remainder of Lot 1-A of Land Court Application 966;
4.  $48^{\circ} 17'$ —112.86 feet along the remainder of Lot 1-A of Land Court Application 966, along the remainder of United States Navy Parcel "B", to the point of beginning and containing an area of 4514 square feet. [728]

#### PARCEL D-15

Being portions of Lots E, F and J of Land Court Application 1074 at Moanalua, Oahu, T. H. Being a portion of Alternate Highway from Honolulu to Schofield (100 feet wide).

Beginning at a point on the Westerly boundary of the lands of Moanalua (Land Court Application 1074) and Halawa (Land Court Application 966) and the co-ordinates of said point of beginning referred to Government Survey Triangulation Station "Salt Lake" being 2625.32 feet South and 6227.90 feet West and thence running by azimuths measured clockwise from True South:

1.  $226^{\circ} 59'$ —114.26 feet along Lot 1-A of Land Court Application 966;
2.  $345^{\circ} 54' 50''$ —1739.58 feet along the remain-

- ders of Lots J and F of Land Court Application 1074;
3. Thence along the remainder of Lot J of Land Court Application 1074, on a curve to the left with a radius of 1860.08 feet, the direct azimuth and distance being  $336^{\circ} 54' 50''$ —581.96 feet;
  4.  $327^{\circ} 54' 50''$ —550.90 feet along the remainders of Lots J and E of Land Court Application 1074;
  5. Thence along the remainder of Lot J of Land Court Application 1074, on a curve to the left with a radius of 1096.28 feet, the direct azimuth and distance being  $313^{\circ} 00' 50''$  563.78 feet;
  6.  $298^{\circ} 06' 50''$ —2915.15 feet along the remainder of Lot J of Land Court Application 1074;
  7. Thence along the remainder of Lot J of Land Court Application 1074, on a curve to the left with a radius of 1859.89 feet, the direct azimuth and distance being  $282^{\circ} 41' 07''$  989.60 feet;
  8.  $27^{\circ} 05'$ —35.85 feet along Lot H of Land Court Application 1074, along Parcel D-6;
  9.  $21^{\circ} 10'$ —74.71 feet along Lot H of Land Court Application 1074, along Parcel D-6;
  10. Thence along the remainder of Lot J of Land Court Application 1074, along Parcel D-13, on a curve to the right with a radius of 1959.89 feet, the direct azimuth and distance being  $103^{\circ} 23' 30''$  996.34 feet;
  11.  $118^{\circ} 06' 50''$ —2915.15 feet along the remainder

of Lot J of Land Court Application 1074, along Parcel D-13 and Parcel D-1; [729]

12. Thence along the remainders of Lots J and E of Land Court Application 1074, along Parcel D-1, on a curve to the right with a radius of 1196.28 feet, the direct azimuth and distance being  $133^{\circ} 00' 50''$  615.20 feet;
13.  $147^{\circ} 54' 50''$ —550.90 feet along the remainders of Lots J and E of Land Court Application 1074, along Parcel D-1;
14. Thence along the remainder of Lot J of Land Court Application 1074, along Parcel D-1, on a curve to the right with a radius of 1960.08 feet, the direct azimuth and distance being  $156^{\circ} 54' 50''$  613.25 feet;
15.  $165^{\circ} 54' 50''$ —1684.31 feet along the remainders of Lots J and F of Land Court Application 1074, along Parcel D-1, to the point of beginning and containing an area of 16.936 Acres.

[Endorsed]: Filed Dec. 6, 1945. [730]

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[Title of District Court and Cause No. 684.]

### DECLARATION OF TAKING

Whereas, pursuant to the Acts of Congress approved March 27, 1942 (Public Law 507, 77th Congress), as amended by the Act of Congress approved December 20, 1944 (Public Law 509, 78th Congress), and February 7, 1942 (Public Law 441, 77th Congress), the above styled condemnation proceeding has been instituted.

Now, therefore, pursuant to the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), I, Secretary of the Navy, do hereby make and cause to be filed this declaration of taking, and by virtue of authority thereof [733] do hereby state that the lands selected for acquisition aggregate 29.891 acres, more or less, at Moanalua and Halawa, Ewa, Oahu, Territory of Hawaii, more particularly described in Exhibit "A" attached hereto and made a part hereof, and delineated as Parcel D-15 on a map entitled "Composite Boundary Map", designated as 14th N.D. Dwg. No. OA-N1-942, and Parcels A, B, and E on a map entitled "Military Road Aiea to Catlin Portion through Halawa, Ewa, Oahu, T. H.", designated as 14th N.D. Dwg. No. OA-N1-1223, attached hereto as Exhibits "B" and "C" and made a part hereof.

And I do declare said lands to be taken under the authority of the aforesaid Acts of Congress; that the use to which said lands are to be put is for a military road, and for other Naval purposes, as authorized by said Acts.

And I do further declare that the estate hereby taken in said lands, together with all improvements (except such as are attached to the easements and reservations hereinafter set forth) and appurtenances thereto belonging, for the public use aforesaid, is title in fee simple, subject, however, to:

1. As to Parcel D-15, the existing right of the Hawaiian Electric Company, Limited, its successors and assigns, to operate, maintain and repair electric power transmission poles and wire lines, to-

gether with the right of ingress and egress for such purposes, over the right of way, the centerline of which over Parcel D-15 is indicated on Exhibit "B" attached hereto, as follows: "Centerline of Haw'n Electric Co.'s relocated pole line, installed May 26, 1944"; said right having been acquired by the said Hawaiian Electric Company, Limited, from the Trustees of the Estate of Samuel M. Damon, Deceased, by instrument dated 27 April 1945 and filed in the Office of the Assistant Registrar, Land [734] Court Territory of Hawaii (Bureau of Conveyances) on 18 May 1945 as Document No. 78619 and noted on Certificate of Title No. 20,266.

2. As to Parcel D-15, the right hereby reserved unto Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, their successors in trust, assigns and permittees to use said land for roadway purposes, jointly with the United States of America, subject to the authority of the Secretary of the Navy and his duly authorized representatives to promulgate and enforce such rules and regulations relating to the exercise of such right that may be required for Naval security purposes.

3. The right hereby reserved unto:

(1) George Miles Collins, John Kirkwood Clarke, Frank Midkiff, Edwin Pauhaulani Murray, and Joseph Boyd Poindexter, as Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, their successors in trust, assigns, and permittees, as to Parcel A; and

(2) Charles M. Hite, Trustee under the Will and of the Estate of Emma Kaleleonalani, his successors in trust, assigns, and permittees, as to Parcels B and E; and subject to existing leasehold rights of Honolulu Plantation Company, to cross and recross said above described parcels by way of foot, vehicles or portable plantation railroad tracks, for so long only as said parties or their assigns other than the United States of America are fee owners of lands abutting on said parcels.

4. An easement hereby reserved unto the fee owner, Charles M. Hite, Trustee under the Will and of the Estate of Emma Kaleleonalani, his successors in trust, assigns, and permittees, subject to the existing leasehold rights of Honolulu Plantation Company, for railroad tracks and facilities over Parcel B, over and along the right of way described and shown as Easement 1 in Exhibits "A" and "C", attached hereto and made a part hereof, for so long only as said right of way is used for said purposes.

And I, Secretary of the Navy, do hereby state that the sum of money estimated by me to be just compensation for said lands, and improvements thereon and appurtenances thereunto belonging, is Six thousand one hundred fifty-four Dollars and ninety-eight cents (\$6,154.98), which sum is hereby deposited into the registry of the court for the use and benefit of the [735] persons entitled thereto, and that the amounts of just compensation for said lands and improvements thereon, which are hereby taken, are shown on Schedule "A" attached hereto and made a part hereof.

I am of the opinion that the ultimate award for the taking of said lands will be within the limits prescribed by Congress.

In witness whereof, the petitioner, by and through the Secretary of the Navy, has caused this declaration of taking to be signed on the 5th day of September, 1945, in the City of Washington, District of Columbia.

UNITED STATES OF  
AMERICA,

By /s/ JAMES FORRESTAL. [736]

SCHEDULE "A"

The names of the persons having title to or other interest in the lands described in the within declaration of taking, and the amounts estimated to be fair compensation for each respective ownership, including all improvements thereon, are as follows:

Name of Owner	Parcel	Acres	Estimated Just Compensation
B. P. Bishop Est.	A	3.523	\$1,333.30
Queen Emma Estate	B & E	9.432	1,873.80
S. M. Damon Estate	D-15	16.936	2,947.88
		<hr/>	<hr/>
	Total	29.891	\$6,154.98

[Printer's Note]: Exhibit "A" is the same as Exhibit "A" set out at pages 402-409.

[Endorsed]: Filed Dec. 6, 1945. [737]

In the District Court of the United States  
for the District of Hawaii

October Term 1945

Civil No. 684

UNITED STATES OF AMERICA,

Petitioner,

vs.

29.891 ACRES OF LAND, more or less, in Moana-  
lua and Halawa, Ewa, Oahu, Territory of Ha-  
waii, Ernest Hay Wodehouse, Walter Francis  
Frear and John Edward Russell, Trustees under  
the Will and of the Estate of Samuel M. Damon,  
deceased, et al.,

Defendants.

## ORDER AND JUDGMENT ON DECLARATION OF TAKING

It appearing that on the 6th day of December, 1945, the United States of America filed a Petition for Condemnation of certain lands described and shown upon Exhibits "A", "B" and "C" attached to th Petition filed herein, and on Exhibits "A", "B" and "C" attached to the Declaration of Taking filed herein, and it further appearing that said Declaration of Taking was this day filed herein; said Declaration of Taking being signed by James Forrestal, Secretary of the Navy, under and pursuant to the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421), declaring taken the title in fee simple to said lands, subject to:

1. "As to Parcel D-15, the existing right of the Hawaiian Electric Company, Limited, its successors and assigns, to operate, maintain and repair electric power transmission poles and wire lines, together with the right of ingress and egress for such purposes, over the right of way, the centerline of which over Parcel D-15 is indicated on Exhibit "B" attached hereto, as follows: "Centerline of Haw'n Electric Co.'s relocated pole line, installed May 26, 1944"; said right having been acquired by the said Hawaiian Electric Company, Limited, from the Trustees of the Estate of [747] Samuel M. Damon, deceased, by instrument dated 27 April 1945 and filed in the Office of the Assistant Registrar, Land Court Territory of Hawaii (Bureau of Conveyances) on May 18 1945 as Document No. 78619 and noted on Certificate of Title No. 20,266.

2. As to Parcel D-15, the right hereby reserved unto Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, their successors in trust, assigns and permittees to use said land for roadway purposes, jointly with the United States of America, subject to the authority of the Secretary of the Navy and his duly authorized representatives to promulgate and enforce such rules and regulations relating to the exercise of such right that may be required for Naval security purposes.

3. The right hereby reserved unto:

(1) George Miles Collins, John Kirkwood Clarke, Frank Midkiff, Edwin Pauhaulani Mur-

ray, and Joseph Boyd Poindexter, as Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, their successors in trust, assigns, and permittees, as to Parcel A; and

(2) Charles M. Hite, Trustee under the Will and of the Estate of Emma Kaleleonalani, his successors in trust, assigns, and permittees, as to Parcels B and E; and subject to existing leasehold rights of Honolulu Plantation Company, to cross and recross said above described parcels by way of foot, vehicles or portable plantation railroad tracks, for so long only as said parties or their assigns other than the United States of America are fee owners of lands abutting on said parcels.

4. An easement hereby reserved unto the fee owner, Charles M. Hite, Trustee under the Will and of the Estate of Emma Kaleleonalani, his successors in trust, assigns, and permittees, subject to the existing leasehold rights of Honolulu Plantation Company, for railroad tracks and facilities over Parcel B, over and along the right of way described and shown as Easement 1 in Exhibits "A" and "C", attached hereto and made a part hereof, for so long only as said right of way is used for said purposes,"

that the uses of said land are those described in the said Declaration of Taking and in the Petition herein; and that the said Declaration of Taking sets forth the estimate of just compensation made pursuant to law and that contemporaneously with the filing of said Declaration of Taking, there was deposited in the registry of this Court for the use

of the persons entitled thereto the sum of Six Thousand One Hundred Fifty-four and 98/100 Dollars (\$6,154.98), [748]

It is ordered, adjudged and decreed that by virtue of the filing of said Declaration of Taking and the deposit of said money, title in fee simple to the lands described and shown on Exhibits "A", "B" and "C", attached to the said Declaration of Taking, is indefeasibly vested in the United States of America; subject to:

1. "As to Parcel D-15, the existing right of the Hawaiian Electric Company, Limited, its successors and assigns, to operate, maintain and repair electric power transmission poles and wire lines, together with the right of ingress and egress for such purposes, over the right of way, the centerline of which over Parcel D-15 is indicated on Exhibit "B" attached hereto, as follows: "Centerline of Haw'n Electric Co.'s relocated pole line, installed May 26, 1944"; said right having been acquired by the said Hawaiian Electric Company, Limited, from the Trustees of the Estate of Samuel M. Damon, Deceased, by instrument dated 27 April 1945 and filed in the Office of the Assistant Registrar, Land Court Territory of Hawaii (Bureau of Conveyances) on 18 May 1945 as Document No. 78619 and noted on Certificate of Title No. 20,266.

2. As to Parcel D-15, the right hereby reserved unto Ernest Hay Wodehouse, Walter Francis Frear and John Edward Russell, Trustees under the Will and of the Estate of Samuel M. Damon, deceased, their successors in trust, assigns and permittees to

use said land for roadway purposes, jointly with the United States of America, subject to the authority of the Secretary of the Navy and his duly authorized representatives to promulgate and enforce such rules and regulations relating to the exercise of such right that may be required for Naval security purposes.

3. The right hereby reserved unto:

(1) George Miles Collins, John Kirkwood Clarke, Frank Midkiff, Edwin Pauhaulani Murray, and Joseph Boyd Poindexter, as Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased, their successors in trust, assigns, and permittees, as to Parcel A; and

(2) Charles M. Hite, Trustee under the Will and of the Estate of Emma Kaleleonalani, his successors in trust, assigns, and permittees, as to Parcels B and E; and subject to existing leasehold rights of Honolulu Plantation Company, to cross and recross said above described parcels by way of foot, vehicles or portable plantation railroad tracks, for so long only as said parties or their assigns other than the United States of America are fee owners of lands abutting on said parcels.

4. An easement hereby reserved unto the fee owner, Charles M. Hite, Trustee under the Will and of the Estate of Emma Kaleleonalani, his successors in trust, assigns and permittees, subject to the existing leasehold rights of Honolulu Plantation Company, for railroad tracks and facilities over Parcel B, over and along [749] the right of way described and shown as Easement 1 in Exhibits

“A” and “C”, attached hereto and made a part hereof, for so long only as said right of way is used for said purposes.”

It is further ordered that a copy of this Order be promptly served by the United States Marshal upon each of the defendants named. The Marshal is further ordered to post a copy hereof in a conspicuous place on the premises and to forthwith make due return of his said service to this Court.

Dated: Honolulu, T. H., this 6th day of December, 1945.

(Seal)            /s/ D. E. METZGER,  
Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed Dec. 6, 1945. [750]

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[Title of District Court and Cause No. 684.]

**MOTION FOR ORDER AMENDING PETI-  
TION AND ORDER AND JUDGMENT ON  
DECLARATION OF TAKING**

Now comes the United States of America, Petitioner herein, by Charles F. Rathbun, Special Assistant to the Attorney General, and moves the Court to amend the Petition herein by adding in Paragraph III thereof, on the second page thereof, a new paragraph 2-a to be inserted after the words “Naval Security Purposes” the following:

As to Parcel B, the existing right of The Hawaiian Electric Company, Limited, its suc-

cessors and assigns, to operate, maintain and repair electric power transmission poles and wire lines, together with the right of ingress and egress for such purposes over the right of way; said right having been acquired by The Hawaiian Electric Company, Limited from Charles M. Hite, Trustee under the Will and of the Estate of Emma Kaleleonalani, deceased, by instrument dated July 8, 1943 and filed with the Office of the Assistant Registrar, Land Court, Territory of Hawaii, Bureau of Conveyances, on August 16, 1943, as Document No. 69105 and 69106 and noted on Certificate of Title No. 20,226.

And to amend the Order & Judgment on Declaration of Taking entered herein on December 6, 1945, by excluding therefrom the said easement as described [751] in said Amendment to the Petition herein as paragraph 2-a, pursuant to a stipulation entered into in this cause between the Hawaiian Electric Company, Limited and the United States of America, which stipulation is this day filed in the above cause.

Dated: Honolulu, T. H., this 22nd day of April, 1946.

UNITED STATES OF  
AMERICA,

By /s/ CHARLES F. RATHBUN,  
Special Assistant to the  
Attorney General.

[Endorsed]: Filed April 22, 1946. [752]

[Title of District Court and Cause No. 684.]

ORDER AMENDING PETITION AND ORDER  
AND JUDGMENT ON DECLARATION  
OF TAKING

This matter coming on to be heard, upon the Motion of the Petitioner herein, to amend the Petition in the above cause and to exclude from the Order & Judgment on Declaration of Taking a certain easement reserved unto the Hawaiian Electric Company, Limited, pursuant to a Stipulation this day filed herein which Stipulation is executed by the Hawaiian Electric Company, Limited and the United States of America,

It is hereby ordered, adjudged and decreed that the Petition herein be amended by adding in Paragraph III thereof, on the second page thereof, a new paragraph 2-a to be inserted after the words "Naval Security Purposes" the following:

As to Parcel B, the existing right of The Hawaiian Electric Company, Limited, its successors and assigns, to operate, maintain and repair electric power transmission poles and wire lines, together with the right of ingress and egress for such purposes over the right of way; said right having been acquired by The Hawaiian Electric Company, Limited from Charles M. Hite, Trustee under the Will and of the Estate of Emma Kaleleonalani, deceased, by instrument dated July 8, 1943 and filed with the Office of the Assistant Registrar, Land Court, Territory of Hawaii, Bureau of Con-

veyances, on August 16, 1943, as Document No. 69105 and 69106 and noted on Certificate of Title No. 20,226. [753]

And that there be excepted from the provisions of the said Declaration of Taking and the Order of Judgment on Declaration of Taking entered herein the following:

As to Parcel B, the existing right of The Hawaiian Electric Company, Limited, its successors and assigns, to operate, maintain and repair electric power transmission poles and wire lines, together with the right of ingress and egress for such purposes over the right of way; said right having been acquired by The Hawaiian Electric Company, Limited from Charles M. Hite, Trustee under the Will and of the Estate of Emma Kaleleonalani, deceased, by instrument dated July 8, 1943 and filed with the Office of the Assistant Registrar, Land Court, Territory of Hawaii, Bureau of Conveyances, on August 16, 1943, as Document No. 69105 and 69106 and noted on Certificate of Title No. 20,226.

Dated: Honolulu, T. H., this 22nd day of April, 1946.

(Seal)           /s/ J. FRANK McLAUGHLIN,  
Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed April 22, 1946. [754]

[Title of District Court and Cause No. 684.]

ANSWER OF HONOLULU PLANTATION  
COMPANY

One of the Defendants Above Named

Comes now Honolulu Plantation Company, a corporation, organized under the laws of the State of California, and doing business in the Territory of Hawaii, one of the defendants in the above entitled cause, and for answer to the petition filed herein says:

I.

That it has neither knowledge or information sufficient to form a belief as to the allegations set forth and contained in Paragraphs I, III, IV, V, VI and VII of said petition, and therefore it neither admits nor denies the same but leaves the petitioner to its proof thereof.

II.

That it admits the allegations contained in Paragraph II of said petition.

III.

That with respect to the allegations of said petition that it claims an interest in the property described in said petition this defendant admits the same and alleges that at the time of the filing of said petition and until judgment or order was entered on [756] declaration of taking filed in said causes it was the owner of an interest in the lands and in some of the improvements thereon and also admits that its lessor has an interest in the lands described in said petition which are under lease

to this defendant; that the lease creating such interest and estate will be submitted to the Court on the trial of said causes.

And this defendant further alleges as follows:

That for and during a period of over forty years this defendant has been continuously operating and conducting and is now operating and conducting a sugar mill and plantation at Aiea in the District of Ewa, Island of Oahu, T. H., and has been at all times during said period and now is engaged in the business of growing sugar cane and manufacturing sugar therefrom;

That most of the acreage of land taken, by reason of the fertility of the soil thereon, their low elevation, and the comparatively small expense with which they can be irrigated, is peculiarly adapted to the cultivation and growth of sugar cane, and that this defendant was at the time of the filing of the petition in this cause and until the date fixed for the surrendering of possession by the judgment or order on the Declaration of Taking entered in this cause and for many years prior thereto had been profitably using said lands for the cultivation and growth of sugar cane;

That the lands included within the area sought to be condemned which are held by this defendant under lease as aforesaid have a special and enhanced value by reason of the establishment by this defendant of a sugar mill and works, in close proximity to said lands, for the manufacture of sugar from cane grown and cultivated thereon and

on other lands owned and/or leased by this defendant and by reason of the development by this defendant of a water supply for the irrigation of said lands, and other lands as aforesaid by means of artesian wells, pumping machinery and otherwise; [757]

That for the purpose of cultivating the sand lands, this defendant has constructed improvements thereon;

That the parcel of land sought to be condemned by said petition in which this defendant has leasehold interest was at the time of the filing of the said petition in this cause and until judgment or order was entered on Declaration of Taking filed in this cause, and for many years prior thereto had been, occupied and cultivated by this defendant as integral parts of the sugar plantation operated and conducted by it at Aiea aforesaid and in connection with other large and contiguous tracts situated outside of the lands described in said petition but comprised within the said plantation and demised to this defendant by a number of leases and that by the taking of said lands described in the said petitions the integrity of said sugar plantation will be destroyed and the unitary value of the leasehold interests and estates of this defendant in such other and contiguous tracts of land will be greatly impaired and diminished.

Wherefore this defendant prays (1) that the damages suffered by this defendant by reason of the taking of the lands and properties described in

said petitions may be determined and the amount thereof be awarded to and paid to this defendant, and (2) for such other and general relief as may be meet and proper in the premises.

Dated: Honolulu, T. H., June 18, 1946.

HONOLULU PLANTATION  
COMPANY,

By /s/ VITOUSEK, PRATT & WINN,  
Its Attorneys,  
Defendant above named.

[Endorsed]: Filed June 18, 1946. [758]

In the District Court of the United States  
for the District of Hawaii

- No. 514—United States of America, Petitioner, vs. 257.654 Acres of land, more or less, at Moanalua and Halawa, Oahu, Territory of Hawaii, et al., Defendants.
- No. 525—United States of America, Petitioner, vs. 216.124 Acres of land, more or less, in Moanalua, Honolulu, Oahu, Territory of Hawaii, et al., Defendants.
- No. 529—United States of America, Petitioner, vs. 344.893 Acres of land, more or less, at Manana and Waiawa, Ewa, Oahu, Territory of Hawaii, et al., Defendants.
- No. 533—United States of America, Petitioner, vs. 218.349 Acres of land, more or less, at Waiawa Gulch, Waiawa, Oahu, Territory of Hawaii, et al., Defendants.
- No. 535—United States of America, Petitioner, vs. 145.848 Acres of land, more or less, situate at Halawa and Aiea, Ewa, Island of Oahu, Territory of Hawaii, et al., Defendants.
- No. 544—United States of America, Petitioner, vs. 317.705 Acres of land, more or less, situate at Moanalua, Honolulu, Oahu, Territory of Hawaii, et al., Defendants.
- No. 548—United States of America, Petitioner, vs. 63.725 Acres of land, more or less, situate at Moanalua, Honolulu, Oahu, Territory of Hawaii, et al., Defendants.

MOTION FOR CONSOLIDATION

Comes now Honolulu Plantation Company, a corporation, one of the defendants in each and all of the above entitled proceedings which are pending in the said United States District Court for the District of Hawaii, by Stanley, Vitousek, Pratt & Winn, its attorneys, and moves that Honorable Court that the seven above entitled proceedings be consolidated into one proceeding insofar as this movant is concerned and insofar as it has any claim for damages or may claim damages by reason of the taking under the above entitled proceedings: and that this movant be permitted to file one answer

in the consolidated proceedings and that the trial in said consolidated proceedings be had in the same manner as if all of said takings had been in one proceeding and as if all of the allegations contained in the various petitions filed in said proceedings had been embodied in one petition.

This motion is based upon all of the pleadings in the above entitled proceedings and upon the affidavit of S. L. Austin hereto attached.

Dated: Honolulu, T. H., this 17th day of February, 1945.

HONOLULU PLANTATION  
COMPANY,

By STANLEY, VITOUSEK,  
PRATT & WINN,

Its Attorneys,

By /s/ C. DUDLEY PRATT.

[Endorsed]: Filed Feb. 17, 1945. [760]

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[Title of District Court and Causes.]

AFFIDAVIT FOR CONSOLIDATION OF  
ACTIONS

District of Hawaii,  
City and County of Honolulu—ss:

S. L. Austin, being duly sworn, says that he is the Attorney-in-Fact of Honolulu Plantation Company, a corporation, one of the defendants in each and all of the above entitled actions which are pending in the United States District Court for the District of Hawaii as aforesaid; that each of said

actions is a proceeding in eminent domain by the United States of America to obtain for governmental use lands held under lease by the said Honolulu Plantation Company; that the Honolulu Plantation Company owns and operates a sugar plantation on the Island of Oahu in the vicinity of Pearl Harbor; that the lands held and operated by it are contiguous; that said lands being acquired by the United States in said proceedings all form an integral part of the properties being held and operated by the said Honolulu Plantation Company in the conduct by it of a sugar plantation;

That the said Honolulu Plantation Company intends no defense to the institution as such of the above entitled proceedings; that the sole matters for consideration and at issue are the determination of the parties entitled to compensation and their respective interests in the property involved, the amounts to be paid therefor, and the just compensation that is due the said parties because of such taking;

That the trial of the seven (7) suits, set forth in the title heading hereof, will subject said Honolulu Plantation Company to unnecessary costs, expenses and delays;

That the consolidation of the said proceedings will render [762] unnecessary the duplication of proof with respect to the enterprise of said Honolulu Plantation Company and the properties used by it in conducting the same, the effect of removing the property being condemned therefrom and numerous other points with respect to title, occu-

pany, use and numerous factors affecting value and damages suffered and further that the damages suffered by this defendant by reason of the taking of property by means of said proceedings is directly affected by the aggregate of the amount of property taken by condemnation; that said property condemned is merged in all of this defendant's farming property as one "unity in use", operated together and that the severance or taking away of the condemned property will result in substantial damages to the remainder, difficult if not impossible of full and adequate proof in seven separate proceedings; that the damages to be claimed by this defendant by reason of said taking would require the same amount of proof in each of the seven cases if tried separately and would require little, if any, more evidence in a consolidated case than would be required in each of said cases if tried separately; that the amount of land to be taken in the aggregate by reason of said seven cases is very substantial and the proof of the damages that will be suffered by this defendant can more clearly and readily be shown than could be shown in each of the cases separately, and this is particularly true of the cases where the area involved is relatively small in comparison to the total area held and operated by this defendant; that the said Company will be unable to properly present the question of damages if such proceedings are not consolidated and would thereby be deprived of substantial right; that requiring this defendant to try each of said takings separately would subject this

defendant to such excessive expenses and loss of damages suffered as to constitute a deprivation of property without due process of [763] law and a taking for public use without just compensation in violation of the Fifth Amendment of the Constitution of the United States.

Further affiant sayeth not.

/s/ S. L. AUSTIN.

Subscribed and sworn to before me this 17th day of February, 1945.

(Seal) /s/ ALBERT C. AHANA,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My commission expires June 30, 1945.

[Endorsed]: Filed Feb. 17, 1945. [764]

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[Title of District Court and Causes.]

### STIPULATION FOR CONSOLIDATION

It is hereby stipulated by and between the United States of America, petitioner in the above entitled cases, and Honolulu Plantation Company, a corporation, one of the defendants in each and all of the above entitled cases, by their respective attorneys:

That said above entitled proceedings may be consolidated into one proceeding insofar as Honolulu Plantation Company is concerned and insofar as it has any claim for damages or any claimed damages by reason of such taking under said above entitled proceedings; and

It is hereby further stipulated that Honolulu Plantation Company may be permitted to file one answer in the consolidated proceedings and that the trial in said consolidated proceedings may be had in the same manner as if all of said takings had been in one proceeding and as if all of the allegations contained in the various petitions filed in said proceedings had been embodied in one petition.

Dated: Honolulu, T. H., this 17th day of February, 1945.

UNITED STATES OF  
AMERICA,

By /s/ CHARLES F. RATHBUN,  
Special Assistant to the  
Attorney General.

HONOLULU PLANTATION  
COMPANY,

By STANLEY, VITOUSEK,  
PRATT & WINN,  
Its Attorneys,

By /s/ C. DUDLEY PRATT.

[Endorsed]: Filed Feb. 17, 1945. [766]

No. 12023

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United States  
**Court of Appeals**  
for the Ninth Circuit

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UNITED STATES OF AMERICA,  
Appellant,  
vs.  
HONOLULU PLANTATION COMPANY,  
Appellee.  
and  
HONOLULU PLANTATION COMPANY,  
Appellant,  
vs.  
UNITED STATES OF AMERICA,  
Appellee.

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**Transcript of Record**

(In Four Volumes)

**VOLUME II**

(Pages 433 to 840)

**FILED**

DEC 31 1948

**PAUL P. O'BRIEN,**

**CLERK**

Appeal from the United States District Court  
for the District of Hawaii



No. 12023

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United States  
Court of Appeals

for the Ninth Circuit

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UNITED STATES OF AMERICA,  
Appellant,  
vs.  
HONOLULU PLANTATION COMPANY,  
Appellee.  
and  
HONOLULU PLANTATION COMPANY,  
Appellant,  
vs.  
UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record

(In Four Volumes)

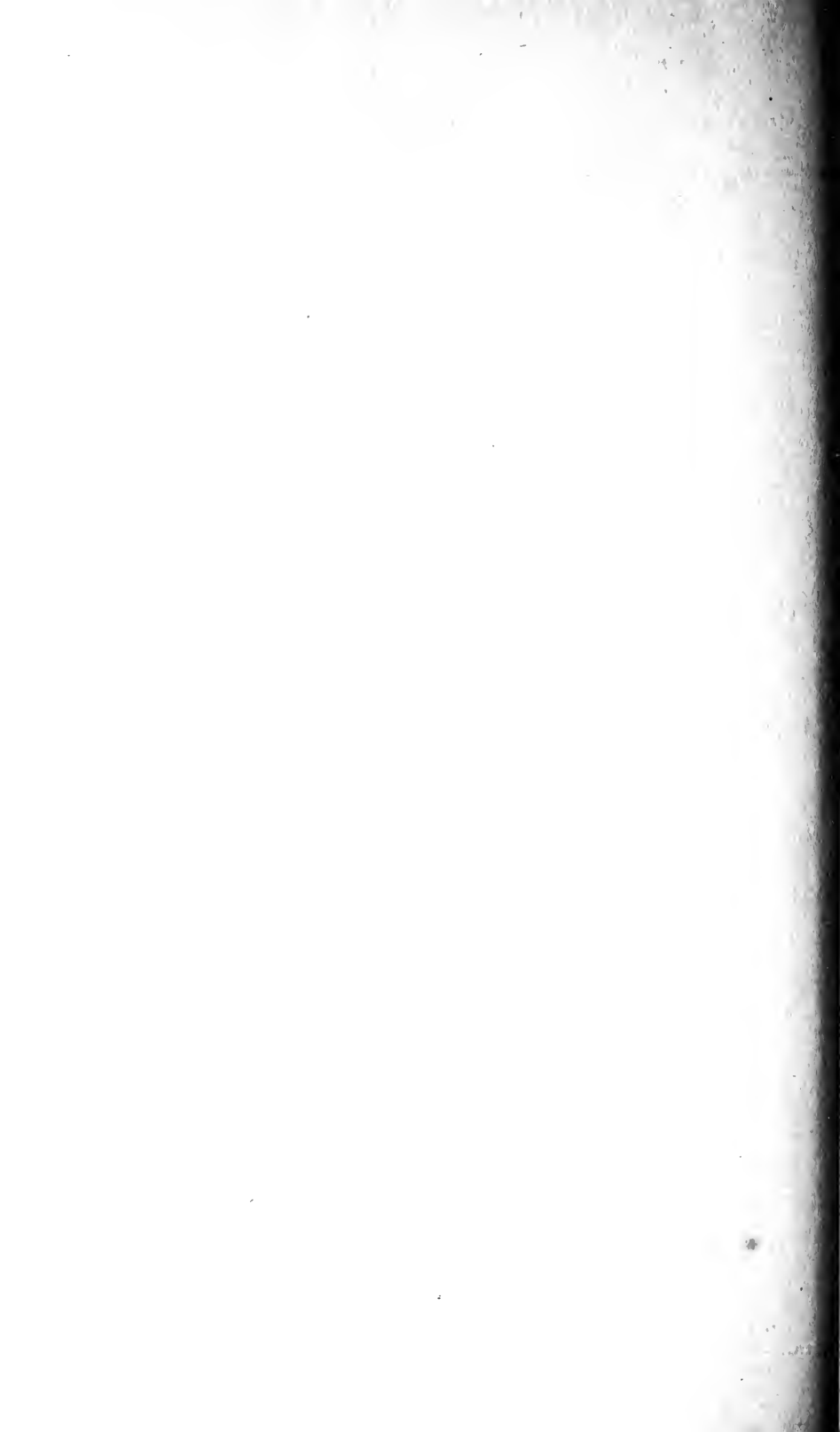
VOLUME II

(Pages 433 to 840)

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Appeal from the United States District Court  
for the District of Hawaii

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[Title of District Court and Causes.]

### ORDER FOR CONSOLIDATION

Upon the motion of Honolulu Plantation Company, a corporation, one of the defendants in each and all of the above entitled proceedings which are pending in the United States District Court for the District of Hawaii, and good cause appearing therefor,

It Is Hereby Ordered that the seven above entitled proceedings be consolidated into one proceeding insofar as the Honolulu Plantation Company is concerned and insofar as it has any claims for damages or may claim damages by reason of the taking under the said proceedings: and

It Is Hereby Further Ordered that said Honolulu Plantation Company be and it is hereby authorized to filed one answer in the consolidated proceedings and that the trial in said consolidated proceedings be had in the same manner as if all of said takings had been in one proceeding and as if all of the allegations contained in the various petitions filed in the various proceedings had been embodied in one petition.

Dated Honolulu, T. H., this 17th day of February, 1945.

(Seal)

/s/ J. FRANK McLAUGHLIN,

Judge of the Above Entitled Court.

[Endorsed]: Filed Feb. 17, 1945.

[768]

[Title of District Court and Causes.]

### STIPULATION

It Is Hereby Stipulated by and between the United States of America, Petitioner in the above entitled cases, and Honolulu Plantation Company, a corporation, one of the defendants in each and all of the above entitled cases, by their respective attorneys:

1. That Two Hundred Eighty-five Thousand and 00/100 Dollars (\$285,000.00) is just compensation, inclusive of interest to and including the 18th day of February, 1945, to which the Honolulu Plantation Company, a corporation, one of the defendants in each and all of the above entitled cases, is entitled as just and full compensation for its growing crops and stools, by reason of the condemnation of the properties in each of the proceedings herein and by reason of the destruction of growing crops and stools in and along a certain military road, delineated as Parcel D-15, an area of 16.9368 acres, on 14th Naval District Map OA-N1-942 dated January 5, 1945 attached hereto as Exhibit "A", and delineated as Parcels A, B, C, D, and E, an area of 13.142 acres, on the 14th Naval District Map OA-N1-1223 and attached hereto as Exhibit "B" and for the destruction of growing crops and stools by reason of the construction of a certain fresh water pipe line, the center line of which is shown on 14th Naval District Map OA-N1-912 as portions N-1, T-1, N-2, T-2, N-3, B and E, which map is attached hereto as Exhibit "C"; and that the said

sum of \$285,000.00 shall be in full satisfaction of and just compensation for any and all claims and damages suffered by said [770] defendant, Honolulu Plantation Company, in each of the above styled cases and references, for the taking of its growing crops and stools by the United States of America; said sum shall also be inclusive of any claim said defendant may have or claim to have against the United States of America or any department or agency thereof for compliance payments under the Sugar Control Act for the production of sugar with respect to the unharvested growing crops on the real property first above described, but shall not include the settlement of any other claims for damages.

2. That on the 10th day of February 1945, there was deposited by the petitioner in case Civil No. 514 the sum of \$46,666.10; that on the 10th day of February, 1945, there was deposited in case Civil No. 525 the sum of \$10,655.53; and on the 29th day of January, 1945, there was deposited in case Civil No. 544 the sum of \$66,039.94; as estimated just compensation to the said Honolulu Plantation Company.

3. That said Honolulu Plantation Company is entitled to a judgment against the United States of America for the sum of \$285,000.00, inclusive of Interest to February 18, 1945, and that the entry of said judgment shall be accomplished by entering a judgment in the sum of \$285,000.00, inclusive of interest to February 18, 1945, in each of the said seven cases above as consolidated, and it is agreed

that the Clerk may issue his check to said Honolulu Plantation Company for the sum of \$123,361.57, total amount of the deposits in the cases above mentioned as estimated just compensation to Honolulu Plantation Company and the balance of \$161,638.43 shall be paid by petitioner to the Clerk of this Court.

It Is Further Stipulated and Agreed that an executed copy of this stipulation shall be filed in each of the above entitled cases and the parties hereto consent to the entry by this Court of all orders and decrees necessary and appropriate to effectuate this stipulation and agreement.

Dated Honolulu, T. H., this 17th day of February 1945.

**UNITED STATES OF  
AMERICA,**

Petitioner,

By /s/ CHARLES F. RATHBUN,  
Special Assistant to the  
Attorney General.

**HONOLULU PLANTATION  
COMPANY,**

By STANLEY, VITOUSEK,  
PRATT & WINN,  
Its Attorneys,

By /s/ C. DUDLEY PRATT.

In the District Court of the United States  
For the District of Hawaii

[Cases Nos. 514, 525, 529, 533, 535, 548.] [771]

### JUDGMENT

This case coming on to be heard upon the files and records in the above proceedings and upon the Stipulation dated the 17th day of February, 1945, and executed by and between the United States of America and the Honolulu Plantation Company, a corporation, one of the defendants in the above cause, and filed in this cause as consolidated on the 17th day of February, 1945, and it appearing from the said Stipulation that the sum of \$285,000.00, inclusive of interest to February 18, 1945, is full and just compensation to which said Honolulu Plantation Company is entitled by reason of the taking of the growing crops and stools in said proceedings belonging to or claimed by said Honolulu Plantation Company and by reason of destruction of growing crops and stools in connection with other properties not involved in the condemnation cases above mentioned but which are shown and described in the said Stipulation, and maps attached thereto, and including any claim by said Honolulu Plantation Company against the United States of America or any department or agency thereof for compliance payments under the Sugar Control Act for production of sugar with respect to the unharvested growing crops on the real property above mentioned; but excluding claims of Honolulu Plantation Company for the taking of its im-

provements and for any and all other damages claimed by it; and

It appearing that on the 10th day of February, 1945, there was deposited by the petitioner in case Civil No. 514 the sum of \$46,666.10; that on the 10th day of February, 1945, there was deposited in case Civil No. 525 the sum of \$10,655.53; and on the 29th day of January, 1945, there was deposited in case Civil No. 544 the sum of \$66,033.94; as estimated just compensation to the said Honolulu Plantation Company; and [772]

It appearing that said Honolulu Plantation Company is entitled to a judgment, subject to the above inclusions and exclusions, against the United States of America for the sum of \$285,000.00, which sum includes interest to February 17, 1945:

Now Therefore, on motion of the Honolulu Plantation Company and of the United States of America, It Is Ordered that the Clerk be and he is hereby directed, pursuant to the terms of said Stipulation, to enter a judgment against the United States of America, petitioner, in the above causes as consolidated, fixing the amount of the compensation and damages, present and future, to its growing crops and stools by reason of the condemnations and takings aforesaid at the sum of \$285,000.00, and that the said Honolulu Plantation Company do have and recover of the United States of America in cases Civil 514, 525, 529, 533, 535, 544 and 548, as consolidated, in the sum of \$285,000.00, including interest to February 18, 1945, and that the said judgment in each of said cases will be

satisfied by the issuance by the Clerk of this Court of his check in the sum of \$123,361.57, payable to said Honolulu Plantation Company and by the payment on or before February 18, 1945 of the sum of \$161,638.43 to the Clerk of this Court, which last sum named shall be paid by the Clerk of this Court to said Honolulu Plantation Company after it is so deposited, and upon the payment of said sums by the Clerk of this Court on or before February 18, 1945, the said judgment so entered in each of said seven cases as consolidated, shall be satisfied in each of said cases as herein limited, and a receipt and satisfaction shall be filed with the Clerk of said Court covering any and all claims for compensation and damages on account of the growing crops and stools taken or destroyed in connection with the properties referred to in the Stipulation on file herein and shown on Exhibits "A" "B" and "C" attached thereto leaving the issues [773] with respect to the damages claimed by the defendant Honolulu Plantation Company covering its improvements taken and other damages claimed by it open for further disposition.

Dated Honolulu, T. H., this 17th day of February, 1945.

(Seal)     /s/ WM. F. THOMPSON, JR.,

Clerk of the Above Entitled Court.

Let the foregoing Judgment be entered:

/s/ J. FRANK McLAUGHLIN,

Judge of the Above Entitled Court.

[Endorsed]: Filed Feb. 17, 1945.

[774]

[Title of District Court and Causes.]

### SATISFACTION OF JUDGMENT

To the Clerk of the Above Entitled Court:

The judgment entered in this cause awarding just compensation in the sum of Two Hundred Eighty-five Thousand and 00/100 Dollars (\$285,000.00), which includes interest computed to February 18, 1945, to Honolulu Plantation Company for the taking by petitioners of growing crops and stools taken or destroyed in the above mentioned proceedings and in connection with other properties not involved in said condemnation cases but shown and described in the stipulation filed in said matter and the maps attached thereto but excluding all other claims for damages, has been fully satisfied and discharged and the Clerk of this Court is authorized and directed to satisfy the same of record.

Dated Honolulu, T. H., this 19th day of February, 1945.

HONOLULU PLANTATION  
COMPANY,

By /s/ S. L. AUSTIN,  
Its Attorney-in-Fact.

[Endorsed]: Filed Feb. 19, 1945.

[776]

In the District Court of the United States  
for the District of Hawaii

- No. 514—United States of America, Petitioner, vs. 257.654 Acres of land, more or less, at Moanalua and Halawa, Oahu, Territory of Hawaii, et al., Defendants.
- No. 521—United States of America, Petitioner, vs. 49.058 Acres of land, more or less, McGrew Point, Kalanao, Ewa, Oahu, Hawaii, and Katherine McGrew Cooper, et al., Defendants.
- No. 525—United States of America, Petitioner, vs. 216.124 Acres of land, more or less, in Moanalua, Honolulu, Oahu, Territory of Hawaii, et al., Defendants.
- No. 527—United States of America, Petitioner, vs. 93.355 Acres of land, more or less, in Moanalua, Honolulu, Oahu, Hawaii, et al., Defendants.
- No. 529—United States of America, Petitioner, vs. 344.893 Acres of land, more or less, at Manana and Waiawa, Ewa, Oahu, Defendants.
- No. 532—United States of America, Petitioner, vs. 8.279 Acres of land, more or less, at Halawa, Oahu, Territory of Hawaii, et al., Defendants.
- No. 533—United States of America, Petitioner, vs. 218.349 Acres of land, more or less, at Waiawa Gulch, Waiawa, Oahu, Territory of Hawaii, et al., Defendants.
- No. 535—United States of America, Petitioner, vs. 145.848 Acres of land, more or less, situate at Halawa and Aiea, Ewa, Island of Oahu, Territory of Hawaii, et al., Defendants.
- No. 536—United States of America, Petitioner, vs. 26.222 Acres of land, more or less, situate at Waiawa, Waimalu, Ewa, Island of Oahu, Territory of Hawaii, et al., Defendants.
- No. 540—United States of America, Petitioner, vs. 124.914 Acres

of land, more or less, situate at Haiku Valley, Heeia, Koolau-poko, Oahu, Territory of Hawaii, et al., Defendants.

No. 544—United States of America, Petitioner, vs. 317.705 Acres of land, more or less, situate at Moanalua, Honolulu, Oahu, Territory of Hawaii, et al., Defendants.

No. 548—United States of America, Petitioner, vs. 63.725 Acres of land, more or less, situate at Moanalua, Honolulu, Oahu, Territory of Hawaii, et al., Defendants.

No. 684—United States of America, Petitioner, vs. 29.891 Acres of land, more or less, in Moanalua and Halawa, Ewa, Oahu, Territory of Hawaii, et al., Defendants.

### MOTION FOR CONSOLIDATION

Comes now Honolulu Plantation Company, a corporation, one of the defendants in each and all of the above entitled proceedings which are pending in the said United States District Court for the District of Hawaii, by Vitousek, Pratt and Winn, its attorneys, and moves the Honorable Court that the six above entitled proceedings Numbered 521, 527, 532, 536, 540, and 684 and the consolidated proceedings (being the consolidation of Civil Cases Numbers 514, 525, 529, 533, 535, 544, and 548) be consolidated into one proceeding insofar as this movant is concerned and insofar as it has any claim for damages or may claim damages by reason of the taking under the above entitled proceedings; and that the trial in said consolidated proceedings be had in the same manner as if all of said takings had [782] been in one proceeding and as if all of the allegations contained in the various petitions

filed in said proceedings had been embodied in one petition.

This motion is based upon all of the pleadings in the above entitled proceedings and upon the affidavit of S. L. Austin hereto attached.

Dated Honolulu, T. H., this 9th day of October, 1946.

HONOLULU PLANTATION  
COMPANY,

By VITOUSEK, PRATT & WINN,  
Its Attorneys.

By /s/ R. A. VITOUSEK. [783]

AFFIDAVIT FOR CONSOLIDATION  
OF ACTIONS

District of Hawaii,  
City and County of Honolulu—ss.

S. L. Austin, being duly sworn, says that he is the attorney-in-fact of Honolulu Plantation Company, a corporation, one of the defendants in each and all of the above entitled actions which are pending in the United States District Court for the District of Hawaii as aforesaid; that each of said actions is a proceeding in eminent domain by the United States of America to obtain for governmental use lands held under lease or in fee by the said Honolulu Plantation Company; that the Honolulu Plantation Company owns and operates and at the time each of said actions was filed, owned and operated a sugar plantation on the Island of Oahu,

Territory of Hawaii, in the vicinity of Pear Harbor; that the lands held and operated by it were contiguous; that said lands acquired by the United States in said actions all formed an integral part of the properties that were being so held, used and operated by the said Honolulu Plantation Company as a unit in the conduct by it of said sugar plantation;

That there has been taken from the operating properties of the said Company 1079.66 acres of cane land (together with certain improvements) by reason of said above entitled actions, leaving for operation 3309.25 acres of cane land (both fee and leasehold) and a sugar mill, camps, pumps, irrigation systems and other properties that formed a part of said sugar plantation enterprise;

That upon the 17th day of February, 1945, by order of this Court, the above-named actions numbered respectively Nos. [784] 514, 525, 529, 533, 535, 544 and 548 were consolidated into one proceeding insofar as the Honolulu Plantation Company was concerned and insofar as it has any claims for damages or may claim damages by reason of the taking under the said proceedings;

That the said Honolulu Plantation Company intends no defense to the institution as such of the above entitled actions; that the sole matters for consideration and at issue are the determination of the parties entitled to compensation and their respective interests in the property involved, the amounts to be paid therefor, and the just compensation that is due the said parties because of such

taking and the Company is claiming no damages except against the United States;

That the separate trial of the consolidated action and of the remaining six (6) actions, making in all seven (7) actions to be tried, will subject said Honolulu Plantation Company to unnecessary costs, expenses and delays;

That the Honolulu Plantation Company claims compensation for specific improvements, for pre-paid rental, for fee simple land and for other specific property taken and in addition it claims damages for depreciation in market value of the physical properties of the Company remaining after the taking of the properties being condemned in the said above entitled actions;

That the consolidation of the said actions will render unnecessary the duplication of proof with respect to the enterprise of said Honolulu Plantation Company and the properties used by it in conducting the same, the effect of removing the property being condemned therefrom and numerous other points with respect to title, occupancy, use and numerous factors affecting value and damages suffered, and further that the [785] damages suffered by this defendant by reason of the taking of property by means of said proceedings is directly affected by the aggregate of the amount of property taken by condemnation; that said property condemned is merged in all of said Company's sugar producing property as one "unity in use", operated together and that the severance or taking away

of the condemned property will result in substantial damages to the physical properties of this defendant remaining after the taking of the properties involved in said actions, difficult if not impossible of full and adequate proof in seven (7) separate proceedings; that the damages to be claimed by said Company by reason of said taking would require the same amount of proof in each of the seven (7) proceedings if tried separately and would require little, if any, more evidence in a consolidated action than would be required in each of said actions if tried separately; that the amount of land to be taken in the aggregate by reason of said actions is very substantial and the proof of the damages that will be suffered by this defendant can more clearly and readily be shown in one consolidated proceeding than could be shown in each of the actions separately, and this is particularly true of the actions where the area involved is relatively small in comparison to the total area held and operated by said Company; that the said Company will be unable to properly present the question of damages if such actions are not consolidated and would thereby be deprived of substantial right; that requiring said Company to try each of said takings separately would subject it to such excessive expense and loss of damages suffered as to constitute a deprivation of property without due process of law and a taking for public [786] use without just compensation in violation of the Fifth Amendment of the Constitution of the United States;

That the practice of leasing lands instead of owning them and of building up enterprises with leased lands for the purpose of raising sugar cane was the prevailing practice in all of the Hawaiian Islands, particularly on the Island of Oahu, both at the time of the filing of each of the above entitled actions and at all times prior thereto since the year 1851; that there is not land available to Honolulu Plantation either through purchase or lease suitable for sugar cane raising purposes to replace the land taken in the above entitled actions; that because of the well established business practices prevailing in the Hawaiian Islands and particularly on the Island of Oahu said Honolulu Plantation could and did feel assured, and had every reason to so do, that its leases of cane lands would be renewed on reasonable terms on the respective expiration dates;

That the filing of the separate actions above mentioned amounts to chopping the interests of Honolulu Plantation Company into bits and such actions become instruments of confiscation and not the means of obtaining just compensation for what is being taken and just compensation for the damages caused to the remainder of the property of said Company by reason of the taking;

That the Company presented a claim bill to the United States Congress asking for damages to its real property, mill, water systems, remaining leaseholds, and other enterprise properties not expropriated by the United States for the **depreciation in**

the market value thereof arising out of the takings under various condemnation actions both in the above captioned cases and in others previously brought; that the bill was presented because of the consistent contentions of the government that such [787] loss could not be recovered in condemnation suits;

That such bill passed the House of Representatives authorizing the Court of Claims to adjudicate the same and while said bill was pending in the Senate, the Attorney General wrote a letter opposing it on several grounds, one of which being that the question was posed to this court in these actions and had not been determined; an exact copy of said letter is hereto attached as Exhibit "A" and is hereby made a part of this affidavit;

That it is not clearly apparent from said letter whether or not the Attorney General of the United States now admits that such damages can legally be awarded said Company;

That if the United States admits that said Company is legally entitled to recover by way of damages the loss in the market value of its physical properties remaining after the taking, occasioned by the taking, such loss can only be fairly and justly ascertained by consolidating all of the said actions and having one trial of said consolidated actions; if the United States denies that this Company is legally entitled to recover such damages, such defense can as readily be interposed and can certainly more expeditiously be interposed in a trial

of said actions consolidated into one proceeding than it could in a separate trial of said actions.

Further affiant sayeth not.

/s/ S. L. AUSTIN.

Subscribed and sworn to before me this 7th day of October, 1946.

(Seal) /s/ LILLIAN H. MARKHAM,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My Commission expires June 30, 1949. [788]

EXHIBIT "A"

Honorable Allen J. Ellender                      July 22, 1946  
Chairman, Committee on Claims  
United States Senate  
Washington, D. C.

My dear Senator:

I invite your attention to the bill (H. R. 2688) to confer jurisdiction upon the United States Court of Claims to hear, determine and render judgment upon the claim of the Honolulu Plantation Company. This bill, prior to its amendment within the House Committee on Claims provided for an appropriation of \$3,250,000 for alleged damages sustained by the company.

At the request of the Chairman of the House Committee on Claims, this Department made a report on the original draft of the bill. The character of the bill has been fundamentally changed as a result of the amendments made in the House.

As so amended it would confer jurisdiction upon the Court of Claims, "notwithstanding any prior determination, statute or decision, to hear, determine, and render judgment upon the claim of the Honolulu Plantation Company, a California corporation, for damages to its real property, mill, water system, remaining leasehold and other enterprise properties not expropriated by the United States Government, and located on the Island of Oahu, in the Territory of Hawaii, for the depreciation in the market value thereof arising out of expropriations by the United States of divers land upon which said claimant held leases, in proceedings wherein said lands were condemned in the United States District Court in and for the Territory of Hawaii, and designated as civil numbered 416, 430, 434, 436, 442, 452, 514, 525, 529, 533, 535, 544, and 548."

The condemnation proceedings referred to in the bill were instituted beginning in the case of civil numbered 416 on October 30, 1939. The case numbered 548 is the one last filed and that occurred on January 20, 1945. As to six of the cases, namely Nos. 416, 430, 434, 436, 442 and 452, I find that a stipulation with the attorneys for the Honolulu Plantation Company was entered into and filed in the office of the clerk of the court on January 8, 1943. This stipulation contains the following: "That \$239,413.58 is just compensation (exclusive of interest) to which Honolulu Plantation Company, one of the respondents and/or defendants in each and all of the above entitled cases, is entitled by reason

of the condemnation in said proceedings of any properties belonging to or claimed by said Honolulu Plantation Company, or any interest it may have in the properties condemned in said proceedings, and on account of any damages, present and future, suffered by it by reason of said condemnation proceedings, including, without limitation as to the generality of the foregoing, severance damage, value of crops, claims for compliance payments, and any other claims it had or may have against the United States of America, or any department or agency thereof, by reason of said condemnation proceedings, \* \* \*."

In view of this stipulation it would seem that at least with respect to the six cases covered by it the Honolulu Plantation Company has had its day in court and has agreed that it has received full compensation "on account of any damages, present and future, suffered by it by reason of said condemnation proceedings, including, without limitation as to the generality of the foregoing, severance damage, value of crops, claims for compliance payments, and any other claims it had or may have against the United States of America, or any Department or agency thereof, by reason of said condemnation proceedings".

With respect to the seven remaining cases specified in the bill, I find that an answer was filed in the office of the clerk of the court on February 17, 1945. This answer claims compensation not only for the value of the interests asserted by the Company in the particular parcels involved, but it in-

cludes a claim for "a special and enhanced value" of these interests "by reason of the establishment by this defendant of a sugar mill and works in close proximity to said lands, for the manufacture of sugar cane grown and cultivated thereon and on other lands owned and/or leased by this defendant and by reason of the development by this [790] defendant of a water supply for the irrigation of said lands and other lands as aforesaid by means of artesian wells, pumping machinery and otherwise". The answer also alleges with respect to these particular parcels of land that they were for many years prior to the filing of the condemnation proceedings "occupied and cultivated by this defendant as integral parts of the sugar plantation operated and conducted by it, \* \* \* and in connection with other large and contiguous tracts situated outside of the lands described." The allegation is also made in the answer that "the integrity of said sugar plantation will be destroyed and the unitary value of the leasehold interests and assets of this defendant in such other and contiguous tracts of land will be greatly impaired and diminished." The answer contains a prayer for damages with respect to the taking of the particular parcels and "for such other and general relief as may be meet and proper in the premises".

On February 17, 1945, a stipulation signed by the attorneys for the Honolulu Plantation Company was filed with the clerk of the court covering the seven cases in question. It was agreed in this stipulation that the sum of \$285,000 constituted

“just and full compensation” for growing crops and stools, and that the sum of \$285,000 “shall be in full satisfaction of and just compensation for any and all claims and damages \* \* \* in each of the above styled cases of reference, for the taking of its growing crops and stools by the United States of America”. It is, however, provided in this stipulation that this sum “shall not include the settlement of any other claims for damages”. It would seem to follow that the claims for damages with respect to the entire properties of the Honolulu Plantation Company which are covered in the answer filed with respect to these seven cases is still pending in the court, as the stipulation by its very terms does not cover that part of the claim asserted in the answer. As a matter of fact in the condemnation proceedings in the United States District Court before Judge McLaughlin on May 10, 1946, the seven cases in question were set down for trial in that court on October 7, 1946. [791]

An analysis of the thirteen cases specified in the bill thus discloses that the United States District Court for the District of Hawaii has already fully disposed of the claims of the company with respect to six of the parcels and that its claims are still pending there for determination as to the other seven parcels. It would seem to follow that there is no justification for referring those same claims to another tribunal for adjudication. Indeed, if the bill should be enacted it is possible that there might be pending at the same time a part of the claim both in the United States District Court for the

District of Hawaii and the Court of Claims. Furthermore, in view of the words "notwithstanding any prior determination, statute or decision" contained in lines 15 and 16, page 2 of the bill, possibly the company would be entitled to sue in the Court of Claims with respect to the claims previously adjudicated in their entirety in the six cases mentioned above.

It is to be noted that the bill provides that the damages to be ascertained and adjudged shall be the difference in the fair market value of the fee lands of the mill and other enterprise properties of the claimant as the same existed in 1936 prior to the filing of the condemnation suits and as the same remained in 1945 after the severance and loss of the beneficial use of the lands condemned by the United States. Since the first of the condemnation suits specified in the bill was filed in October 1939 there would seem to be no justification for selecting the year 1936 as the one from which the comparison is to be made as to the value of the company's properties in relation to their value in 1945. However, a much more serious objection to this language is that it may be interpreted to set forth a measure of damages, leaving to the Court of Claims only the computation of the amount of the recovery.

The bill further provides that all testimony adduced before and all documents and evidence received by the subcommittee of the Committee on Claims of the House of Representatives shall be competent evidence of damages sustained as fully

and to the same extent as though the witnesses were present and without further proof and certification. The justification for such a provision is not apparent, for the [792] Court of Claims ought to be permitted to determine, according to the principles of law and the established rules of evidence, if the evidence received by the subcommittee is competent and whether there exists an obligation on the part of the Government to compensate the Honolulu Plantation Company for damages suffered. Certainly fairness and justice require that both parties present and the Court receive their evidence according to the same rules. The Government should not be denied the right to confront and cross-examine the claimant's witnesses and to object to the introduction of improper evidence.

For the foregoing reasons I am unable to recommend the enactment of the bill.

I have been advised by the Director of the Bureau of the Budget that there is no objection to the submission of this report.

With kind, personal regards,

Sincerely yours,

/s/ TOM C. CLARKE,  
Attorney General.

[Endorsed]: Filed Oct. 9, 1946.

[793]

[Title of District Court and Causes.]

## MOTION FOR BILL OF PARTICULARS

Comes now the United States of America, petitioner herein, in each of the foregoing causes and moves for the particulars of the claim or claims of Honolulu Plantation Company as set forth in the various answers filed herein by said Honolulu Plantation Company, with particular reference to the following:

1. Which property condemned in these proceedings is owned by Honolulu Plantation Company in fee simple;

2. Upon which of said properties so condemned is Honolulu Plantation Company the owner of a leasehold interest, giving full particulars as to said leases, if any;

3. A detailed list and location of any improvements existing on the property condemned and whether or not such improvements were removed and returned to said Honolulu Plantation Company by the United States of America or any of the agencies thereof;

4. A list of the improvements placed upon the premises allegedly occupied by the Honolulu Plantation Company as lessee and whether or not said improvements became the property of the lessor upon termination of the lease by virtue of the provisions thereof; [797]

5. The precise nature and extent of the claim

of Honolulu Plantation Company which forms the basis of the claim made in the answer filed by said company stating "that by the taking of said lands described in the said petitions the integrity of said sugar plantation will be destroyed and the unitary value of the leasehold interests and estates of this defendant in such other and contiguous takings of land will be greatly impaired and diminished".

And the petition, of the United States of America, further says, in connection with the application to this Court for a Bill of Particulars as aforesaid, that it is unable to properly and accurately prepare its case for trial without the information aforementioned.

Dated Honolulu, T. H., this 6th day of November, 1946.

UNITED STATES  
OF AMERICA,  
Petitioner herein,

By /s/ CHARLES F. RATHBUN,  
Special Asst. to the Atty. Gen.

By /s/ WILMER H. DRIVER,  
Special Asst. to the Atty. Gen.

I hereby certify that I have read the foregoing motion for a Bill of Particulars, and further certify that, in my opinion, it is necessary that said motion be complied with in order for the United States to properly prepare its case for trial, and

I do further certify that this motion for Bill of Particulars is not taken for purpose of delay.

By /s/ CHARLES F. RATHBUN,  
Special Asst. to the Atty. Gen.

Service of copy admitted this 6th day of November, 1946.

R. A. VITOUSEK,

By YOLANDA HOLCK,  
VITOUSEK, PRATT & WINN,  
Attorneys for Honolulu Plantation Company.

[Endorsed]: Filed Nov. 6, 1946.

[798]

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FROM THE MINUTES OF THE UNITED  
STATES DISTRICT COURT FOR THE  
DISTRICT OF HAWAII

Thursday, November 14, 1946

[Title of Court and Causes.]

On this day came Mr. Wilmer H. Driver, Special Assistant to the Attorney General of the United States, and also came Mr. Roy A. Vitousek of the firm Vitousek, Pratt and Winn, counsel for the Honolulu Plantation Company, a defendant herein. These cases were called for hearing on motion for consolidation.

There being no objections by Mr. Driver, the Court granted said motion for consolidation. [799]

FROM THE MINUTES OF THE UNITED  
STATES DISTRICT COURT FOR THE  
DISTRICT OF HAWAII

Tuesday, November 26, 1946

[Title of Court and Causes.]

On this day came Mr. Charles F. Rathbun and Mr. Wilmer F. Driver, Special Assistants to the Attorney General of the United States, and also came Mr. Roy A. Vitousek of the firm Vitousek, Pratt and Winn, counsel for the defendant herein, Honolulu Plantation Company, Limited. These cases were called for hearing on motion for bill of particulars, requested by the government.

Following argument by respective counsel, said motion was denied by the Court, and exceptions were allowed the petitioner.

Trial by jury was waived by respective counsel.

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[800]

[Title of Court and Causes.]

ORDER FOR CONSOLIDATION

Upon the Motion of Honolulu Plantation Company, a corporation, one of the defendants in each and all of the above entitled proceedings which are pending in the United States District Court for the District of Hawaii, and good cause appearing therefor,

It Is Hereby Ordered that the six above entitled proceedings Numbered 521, 527, 532, 536, 540, and 684 and the consolidated proceedings (being the

consolidation of Civil Cases Numbers 514, 525, 529, 533, 535, 544 and 548) be consolidated into one proceeding in so far as the Honolulu Plantation Company is concerned and in so far as it has any claims for damages or may claim damages by reason of the taking under the said proceedings; and

It Is Hereby Further Ordered that the trial in said consolidated proceedings be had in the same manner as if all of said takings had been in one proceedings and as if all of the allegations contained in the various petitions filed in the various proceedings had been embodied in one petition.

Dated Honolulu, T. H., this 22nd day of November, 1946.

(Seal)

/s/ J. FRANK McLAUGHLIN,

Judge of the Above Entitled Court.

[Endorsed]: Filed Nov. 22, 1946.

[304]

[Title of District Court and Causes.]

J. Frank McLaughlin, Judge

Attorneys for Petitioner: Charles F. Rathbun, Esq., Special Assistant to the Attorney General; Wilmer H. Driver, Esq., Special Assistant to the Attorney General.

Attorneys for Defendant, Honolulu Plantation Company: Stanley, Vitousek, Pratt & Winn, Alexander & Baldwin Bldg., Honolulu, T. H. [80:]

### DECISION

Prior to the institution by the United States, in exercise of its eminent domain powers, of these consolidated thirteen condemnation cases, the Honolulu Plantation Company operated adjacent to Pearl Harbor, upon the Island of Oahu, and irrigated 4,397.34-acre sugar plantation and also a refinery. Since its inception in 1899 this California corporation has conducted its business upon leased land, except for scattered parcels which by good fortune from time to time it has been able to buy in fee. Leasehold plantations, incidentally, are the rule rather than the exception in Hawaii, for usable land in Hawaii is scarce and tightly held by a comparatively few large corporation, trust, and estate owners who buy but rarely sell. As illustrative, in 1945 of the 386,560 acres comprising the Island of Oahu 61.04% of all the land was owned by twenty-eight owners, of whom but one was an

individual. Governmental agencies owned 26.63% of the land, leaving but 12.33% as owned by all others—the bulk of Oahu's population of 348,045 (July 1, 1945). See Exhibit No. 14.

As a result of these thirteen takings in connection with the expansion of the Naval base known as Pearl Harbor—all of which takings under the stipulation of consolidation were agreed to be as of June 21, 1944—the Honolulu Plantation Company was reduced in size from a 4,397.34-acre enterprise to a 3,309.75-acre plantation, or put in terms of tons of raw sugar, from a 21,000-ton plantation to a 15,000-ton plantation. [810]

Arising out of the 1,364.35-acre takings by the Government in these cases, of which 1,087.59 acres were cane land—crop damage having been settled, the Honolulu Plantation Company claims here just compensation for:

1. The taking of certain fee simple land and the improvements thereon owned by it;
2. The taking of certain improvements upon land which it held under lease;
3. Rent prepaid under a lease; and
4. Severance damage.

The jury-waived trial of these issues was of considerable length (December 2, 1946, to January 15, 1947, inclusive of recesses for holidays and the illness of defendant's chief attorney, of which after the trial he suddenly died), and the final brief was filed herein June 5, 1947.

The questions will be resolved in the order above stated, a sequence which reserves to the last the

principal issue between the parties, which happens also to have been an issue considered by the Committee on Claims of the House of Representatives, 79th Congress, 1st Session, Report No. 1313 dated November 28, 1945. H. R. 2688 passed the House, but not the Senate.

I.

What was the fair market value on June 21, 1944, of lands and improvements owned in fee by the Honolulu Plantation Company?

The evidence given by the witnesses may be summarized as follows: [811]

Civil No.	Parcel No.	Government	Defendant
521	2A	\$100	\$470
	A long narrow parcel 35 feet wide and 600 feet long, .47 acre, of which .107 acre is dry, .273 acre swampy, and .18 acre wet but suitable for certain agriculture. A Hawaiian kuleana, that is, a small homestead area owned in fee inside the boundaries of land owned by another and possessing a limited easement of access, not merchantable as lots served by roads.	(Child: Based upon \$700 an acre for dry land; \$400 an acre for wet land; \$50 an acre for swamp land.)	(Ewart: Based upon \$1000 an acre.)  \$500 (Moses: Based upon estimated of worth to surrounding owner.)
	2B	\$75	\$535 (Ewart) \$500 (Moses)
	A small kuleana. .107 acre. Square shape.	(Child)	
529	F-1	\$3,500	\$462
	A kuleana. .77 acre. Site of Honolulu Plantation abandoned Pumping Station, improved by a pump house, a small dwelling, miscellaneous storage sheds, and four artesian wells; (1)	(Child: Land, plus all improvements, best use as homesites. Wells, overimprovement, valued at \$10; pump house 58% good at \$2,500; dwelling 32% good at \$768; sheds at \$100.)	(Ewart: Land only at \$600 per acre.) \$500 (Moses: Land only.)

175 feet deep; (2) 180 feet deep; (3) 176 feet deep; (4) 176 feet deep, connected to pump station, pump removed.	\$24,500	(Austin: Value of wells and pump station 80% good, replacement cost less depreciation \$23,000 plus \$1,500 for dwelling, sheds, etc.)
F-2 .757 acre. Also a kuleana, by stream, no improvements.	\$400	\$514 (Ewart: At \$600 an acre.)
535 2.732 acres In Plantation village of Aiea, 238-foot frontage on main highway; also road along one side; near school, church, and shops. Highest and best use agreed to be for residence purposes; 7 miles from Honolulu; 700 feet to Aiea center.	\$14,100	\$500 (Moses) \$17,850 (Moses: Based upon comparable sales, applied in general.)
		(Child: Based on comparable sales. Gave 25 cents a square foot on main highway; 20 cents a square foot along road; 15 cents a square foot inside lots; over-all 16.9 cents a square foot, minus subdivision costs of 5% and profit 25%.)

In Civil No. 521 I find the fair market value of parcel 2-A to be \$100 and of parcel 2-B to be \$75.

From these two findings it is obvious that as to their market value I have adopted the opinion of John Francis Child, Jr., local appraiser. I have done so because I have been impressed with his careful analysis of the factors involved and the reasons given by him for his opinion. On the contrary, George Robert Ewart III, manager of the land department of the Company's agent, C. Brewer & Company, Ltd., based his judgment upon a base of \$1,000 an acre, and A. L. Moses, local appraiser, upon his opinion of the two kuleanas' worth to surrounding owners. It seems to be that Mr. Ewart, a plantation man so to speak, was thinking in terms of the commonly referred to \$1,000-an-acre rule as to sugar-cane lands. In any event, due to the size, shape, and condition of these kuleanas even Mr. Ewart would, I am sure, concede that the land is not all usable farm land. Mr. Moses, experienced as he is, seemed to place his weight upon the nuisance value which a kuleana might have to the one who owns the land surrounding it. Such does not reflect market value.

In Civil No. 529 as to both parcel F-1 and parcel F-2. I disregard Mr. Moses' opinion as being based upon the nuisance value to the owners whose land surrounds the two kuleanas.

And as to the land, here again Mr. Child's approach and reasoning is to my mind a better reflection of market value than Mr. Ewart's. Here, in-

deed, Mr. Child is higher than Mr. Ewart, for he used a \$1,000-an-Acre base adjusted for size, while Mr. Ewart used a base of \$600 [813] an acre. Both men agreed that these kuleanas would be best used, as was their original purpose, as homesites, and Mr. Child pointed out that due to size they would be uneconomic as farm sites and based his opinion upon a sale of a larger area across the stream from parcel F-2, an instance of 9.916 acres selling for \$1,347 an acre.

So as to parcel F-2, I find the value to be \$75.

The crucial point as to parcel F-1 relates to the four wells and pump house. Here the question is: Though the value of the improvements must be stated separately under the Hawaiian statute (Section 314, Revised Laws of Hawaii 1945), to what extent, if any, did the buildings and the wells enhance the value of the land?

On this point defendant produced H. A. R. Austin, a civil engineer, who testified that:

1. Though the defendant's books revealed a theoretical depreciation of 2 percent, or 68 percent good, the 4 sixteen-year-old encased artesian wells were actually 80 percent good, for all that was needed to operate them was pipe, fittings, and an adequate pump—if in 1944 such things could be purchased—and the pumping station could be put into operation in about two months, as against six months to dig and equip new wells. Re-equipped these wells would supply many millions of gallons of fresh water daily.

As before noted, the Honolulu Plantation Com-

pany had removed its pump for use elsewhere, as it obtained used water cheaper from the nearby Hawaiian Electric Company power station—water which the Electric Company had first used for cooling purposes.

Mr. Austin figured the replacement cost of the pumping station and wells to be \$27,916.72, and that hence the current value of these things was \$23,000 [814] upon a basis of 80 percent good.

Mr. Austin said his figure represented the extent to which the pumping plant enhanced the land's value, and that he considered the demand for water by the City, the Navy, and others and general conditions at the time (June 1944). He agreed that very little of the water available would be needed in the .77 acre in parcel F-1, so he visualized use or sale of the water off the parcel.

2. As to his \$23,000 figure, Mr. Austin added as a rough guess \$1,500 for the house and sheds adjacent to the pump house—a frame, single-wall, two-story, plantation-type house with a corrugated iron roof—and thus obtained his figure of \$21,500.

3. He conceded that the land surrounding parcel F-1 was not owned by defendant and that a buyer would have to obtain easements for a pipeline to get water off parcel F-1 for use elsewhere or for sale.

4. Though he had not reflected upon it previously, the wells and pump house would have a salvage value of \$1,000.

Contrasted with the civil engineer's approach is that of Mr. Child, who stated:

(a) 'The pump house, excluding a pump, had a replacement value of \$4,320 and was 58 percent good, or had a value of about \$2,500;

(b) The frame house (480 sq. ft.) had a replacement value of \$2,400 and was 32 percent good in June 1944, or had a value of \$768;

(c) To the sheds he gave a nominal value of \$100; and

(d) 'To the four wells he gave a figure of \$10, for [815] he claimed them to be an overimprovement for the .77 acre which was best used as a homesite. Mr. Child noted, of course, the fact that as the land was surrounded by land of others, it would not be possible to take the water off parcel F-1 without easements, so he considered it only as an independent kuleana.

There is a degree of soundness to Mr. Child's position insofar as the kuleana itself is concerned, for indeed it could never use all of the water that could be developed thereon. And it is true also that the problem is not the special value which this lot with its water might have to the Honolulu Plantation Company, which, by the way, the evidence showed is now very little as the wells have been abandoned in favor of a cheaper source and hence are now but a potential standby source of water.

On the other hand, it is common knowledge that here in the middle of the Pacific not only is fresh water always relatively scarce, but particularly at the date of taking was it so. The Island's population had more than doubled due to the war, and the Navy needed more fresh water constantly for

its ships. I am thus inclined to accept Mr. Austin's statement that in view of the demand for water by the Board of Water Supply of the City and County of Honolulu, the nearby Pearl City water system (suburban), and the Navy and the condition of the times—war conditions, a prospective buyer would consider as enhancing the value of the kuleana the fact that an abundant supply of fresh water could be developed upon the land from the existing wells by the installation of a [816] few new pipes and a good pump. The Government stresses the lack of availability to civilians of such things as pipes and pumps in June 1944. But even if it is not required to assume a normal state of affairs in fixing market value, still it is reasonable to assume for such a vital commodity as fresh water for purposes of human consumption or agricultural use that at that time appropriate priorities to obtain the needed equipment could readily be obtained by a buyer.

And if in the *McCandless* case, 298 U. S. 342 (1936), it was error for this Court to refuse an offer to prove that water could be developed elsewhere and transported miles over land owned by others to make the subject land sugar-cane land, here in the reverse it would seem also to be in order to assume that a buyer could at a reasonable cost obtain the necessary pipeline easement to get the water off the land in order to use it elsewhere or sell it.

Thus I find the market value of parcel F-1 in Civil No. 529 to be \$24,638, representing:

The land alone .....	\$ 770	(Child's basis of \$1,000 an acre, .77 acre.)
The degree to which the pump house and four wells enhanced its value .....	\$23,000	(Austin)
The frame house.....	768	(Child)
The sheds .....	100	(Child)
<hr/>		
\$24,638		

In Civil No. 535 Mr. Moses and Mr. Child agreed as to the description of the land and in general relied [817] upon comparable data. But here again I accept Mr. Child's opinion, for it seems to me his concrete application of the comparable data to the subject property is more helpful and exact than Mr. Moses' general conclusion from like but unapplied data that he gave the parcel an over-all value of 15 cents a square foot.

Thus I find the market value of the 2.732 acres in Civil No. 535 to be \$14,100.

## II.

Is the Honolulu Plantation Company entitled to compensation for a concrete supply ditch constructed upon land leased by it from (1) the Bishop Estate and (2) the Oahu Railway and Land Company?

The state of the evidence is as follows:

1. The ditch, though partly on the land of two fee owners, is a continuous one. It is a 2 by 1.8 foot concrete supply ditch, and has headwalls, culverts, and openings and where it passes under a road siphon boxes also made of concrete. From this ditch water brought to it by pumps is taken

off as needed into irrigation ditches to water the sugar cane.

2. Two thousand five hundred sixty-five (2,565) feet of the ditch, built in 1937, are on land leased from the Bishop Estate.

3. One thousand nine hundred forty-five (1,945) feet of it, built at the same time, are on land leased from the Oahu Railway and Land Company.

4. Neither it nor any of its parts are removable, except as useless concrete rubble. [818]

5. Mr. Child considered it as a good immovable improvement of the fee but as having no value apart therefrom.

6. Mr. Austin, who designed and laid out the ditch, in reliance upon provisions in the two leases which will be mentioned, stated upon a replacement cost less depreciation the part of the ditch on Oahu Railway and Land Company land enhanced the fee by \$7,725 and the part of the ditch on Bishop Estate land enhanced the fee by \$11,750.

By assuming that each lease would run until its specified expiration date, he depreciated the value of the ditch to the end of the lease to determine the present value of the lessor's interest, which he deducted in each case from the above figure, and thus stated that \$6,185 represented the value of the lessee's interest in the ditch on Oahu Railway and Land Company land upon the date of taking and \$9,400 was the value of the lessee's interest in the part of the ditch on Bishop Estate land upon the date of taking.

The question is basically: Is the Honolulu Plan-

tation Company entitled to these amounts or to nothing for the supply ditch?

The answer will depend upon the construction of the two leases.

The Oahu Railway and Land Company lease to the Honolulu Plantation Company (Exhibit 9-I) provides that upon the expiration of the lease "or sooner determination" all improvements shall become the lessor's property. The Bishop Estate lease (Exhibit 9-G) similarly so provides. [819]

But each lease also has an additional provision that in the event of condemnation the lessee's estate shall cease and determine and it shall not be entitled to any compensation, except as to certain improvements. As to improvements made by the lessee after January 1, 1936, in the case of the Bishop Estate lease (December 2, 1943 amendment to the lease) or after the date of the execution of the Oahu Railway and Land Company lease (July 24, 1936), such compensation as shall be awarded for improvements built by the lessee after 1936 shall be divided "as their [lessor-lessee] interests shall appear, dependent upon the then unexpired term of the lease; \* \* \*."

The Government contends that under these leases the Honolulu Plantation Company owns nothing for which it can be compensated because both leases state that at the end of the term "or sooner termination" all improvements shall become the property of the lessor. True, but the Government chooses to overlook the specific provisions controlling in the event of condemnation. It is my belief that here

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the specific governs the general provisions, and it is obvious that the general clause does not involve termination of the lease by condemnation. In any event the parties took this possibility out from under the general clause by specifically providing for such a contingency, and the specific controls. See *Brooklyn Eastern Dist. Terminal v. City of New York*, 139 F. 2d 1007 (C.C.A. 2d 1944), and *Restatement, Contracts*, Vol. I, paragraph 236.

In view of this holding, upon the basis of the evidence—indeed the only evidence on the point—[820] and believing it proper for valuation purposes to assume that the leases would run their full terms, I find in Civil No. 529 the fair value of the Honolulu Plantation Company interest in this ditch on June 21, 1944, to be:

1. \$6,185 for the part of the Oahu Railway and Land Company land; and
2. \$9,400 for the part on the Bishop Estate land.

### III.

In Civil No. 535, is the Honolulu Plantation Company entitled to \$1,350 representing rent prepaid by it under its sublease obligation to Oahu Sugar Company covering the rent period January 11, 1943, to September 21, 1944, and paid while the Navy was in possession under a right of entry from the Honolulu Plantation Company?

When the question is stated all of the facts appearing in the record are known. Those are all of the facts, and while the Honolulu Plantation Company has paid the rent for a period during which it itself did not enjoy possession of the subleased

property, upon just what basis it relies in claiming that in this proceeding the United States should pay that amount to it is not at all clear.

Apparently through its own fault in not protecting itself under these circumstances, the Honolulu Plantation Company was caught between the right of entry it gave the Navy and its obligation to pay rent nevertheless to Oahu Sugar Company, its sublessor. The fact that it is out of pocket to the extent of \$1,350 does not in and of [821] itself entitle it to relief, especially in a proceeding to establish the market value of an estate in land taken by eminent domain. And in this regard under I herein it has been awarded the value of its estate taken by the Government in Civil No. 535.

For lack of proof this claim to compensation is denied. It would appear that if a remedy at all exists it would lie against Oahu Sugar Company, but that, in turn, might depend upon facts not here revealed.

#### IV.

Is the Honolulu Plantation Company entitled to severance damage?

Under the Company's leases, it is alleged that reserved to it is the right to claim severance damage, and as it has so claimed, this is the question in these consolidated cases.

An affirmative answer involves a possible award on this issue at the rate of \$1,000 per acre for the 1,087.59 cane acres taken while under lease to the Company.

The Company's case is built squarely upon the

Circuit Court's language in *United States v. Baetjer*, 143 F. 2d 391 (C.C.A. 1st 1944), cert. denied, 323 U. S. 772 (1944). In that case the First Circuit Court reversed the lower court and remanded the case for further proceedings, which are now reported in 69 F. Supp. 328 (U.S.D.C. Puerto Rico 1947).

This claim is smaller than the Company's Congressional Claim, for it related to 26 takings (prior ones [822] plus the thirteen here), or 2,428.44 acres for which relief in the sum of \$3,200,000 was asked. Before Congress the Company agreed with the Government that the loss for which it sought relief was a noncompensable capital loss. When the claim reached the Senate, attention was focused upon the part of the claim pending in this Court. With the Baetjer case in mind, the Senate took no action but intimated that the legal issue in these thirteen cases be first resolved.

It is upon the basis of the following that the claim in these cases is predicated.

1. The Honolulu Plantation Company had been developed to the point of being a 36,000-ton sugar (raw) plantation, had been generally successful, and had a good prospect as to the future.

2. Starting in 1939, the Government began taking defendant's property for military use in piecemeal fashion, so that by the date of the outbreak of World War II the takings had reduced the Honolulu Plantation Company to a 21,000-ton plantation, that is, to a point where it could just barely stay in business.

3. Due to military needs in World War II, the Government thereafter in these thirteen separate takings acquired 1,364.35 acres more of defendant's leased land, of which 1,087.59 acres were cane lands. In consequence the Company's cane acreage was reduced to 3,309.75 acres and the Company's agricultural enterprise to a 15,000-ton plantation.

4. There were no other cane lands available in fee or by lease. [823]

5. As a result of these takings bringing this situation about, the land and the permanent improvements thereon remaining have depreciated in value solely due to the severance of the lands taken in these cases, which, with the lands remaining, the Honolulu Plantation Company had operated in a unit as a sugar plantation.

6. The damage caused by this severance is the difference between the value of the Honolulu Plantation Company before and after these thirteen takings. There being no market in 1944 for sugar plantations, the figures used are said to reflect fair value.

The Government stands upon the legal proposition that defendant's evidence describes a business loss and business losses are not compensable in condemnation proceedings. It thus offered no evidence. Indeed, there is no serious dispute upon the law between the parties. The Government concedes that in a proper case severance damage is recoverable. The dispute, therefore, is largely whether the defendant's evidence spells out a proper case of severance damage or an uncompensable business loss.

Summarized, this is the gist of the testimony of defendant's expert witnesses:

A. George L. Schmutz, an appraiser of renown and of wide and varied appraisal experience and author of several books on real estate appraising, such as "Condemnation Appraiser's Handbook" (1938) and "The Appraisal Process" (1941), gave it as his considered opinion that before these takings the fair value of all the Honolulu Plantation Company's physical properties, [824] exclusive of movables and growing crops, was \$4,200,000, and after the takings \$3,113,000, or a loss of \$1,000 per cane acre taken.

Mr. Schmutz's testimony disclosed that he literally considered everything without—in expert fashion—giving any one item any particular weight or dollar value. To mention some of his considerations, he said he took into general consideration:

1. That the Honolulu Plantation Company was an "integrated enterprise engaged in a perfected synchronization of an agricultural and an industrial productivity" by which he meant it grew sugar cane, processed it into raw sugar, and further refined it into white sugar;

2. The Company's dividend record;

3. That in 1940 the Company renewed or extended its major leases to 1965 and, in effect, became a new enterprise;

4. The additional capital of \$1,325,000 invested since the leases were renewed;

5. The Company's book value;

6. Its earning record;

7. A \$1,000-per-acre standard as representing widely held local opinion as to the per-acre value of sugar-cane land;

8. That the mill's capacity before the takings was 20,000 tons of raw sugar and after 15,000 tons;

9. That the takings affected the value of the mill by causing an overcapacity, which increased operating costs, resulting in not as fair a return upon the investment as was previously the case; [825]

10. The fact that the lands were not replaceable; and

11. That raw sugar to refine was not purchasable in sufficient amount to utilize the mill's capacity.

And upon cross-examination Mr. Schmutz allowed that:

(a) He prepared the appraisal section of the Company's claim to Congress;

(b) He studied the Company's earning record as an indication of value;

(c) He studied the Company's dividend record to see if it was successful, and had it not so shown, his opinion would have been different;

(d) There was an error in his figures in the Congressional Claim (Exhibit O, Table I) due to inaccurate data supplied him, but said if the Company lost \$334,265 in 1938 and \$197,559 in 1939, he could not see that it would affect his valuation; he did not know the 1940 net income of \$175,334.81 was used to cover losses of prior years; that if net income available from 1938 to 1943, inclusive, for interest on investment was as reflected by Exhibit

O, Table I, his opinion of value would be less, but just how much he could not say as he relied on no one factor alone;

(e) He deemed the Company successful, though for sixteen years after 1924 the Company paid more in dividends than the amount of earnings available;

(f) As to the Company in 1936 renewing its major leases, he relied upon the statement of attorneys, but if that be not so, his value would decrease at the rate of \$1,000 per acre; and said he was not familiar with [826] the details of the leases;

(g) The Company's net income figures since 1937 included "Compliance Payments," a Government subsidy under the Sugar Act (7 U.S.C. Section 1100 et seq.), and in 1943 the Company paid a dividend of \$150,000 out of \$186,969 available for that purpose, of which \$177,416 had been received as a Government subsidy;

(h) The remaining cane lands, the mill, the irrigation system, and all permanent improvements were as good the day after the takings as before, but he said that they then were of lower value due to an overcapacity; for what was left, he said a buyer would pay less because the mill then became oversized and represented too much capital invested in relations to dollars which it could earn with the land available—in other words, that the land left called for a smaller mill with but a 15,000-ton capacity in order to make a profit on the invested capital;

(i) He agreed with the President of the Com-

pany that by the Government's takings the Company had lost over 50% of its invested capital, but agreed that Exhibit O, Table IX, did not so show;

(j) In 1940 and thereafter it cost the Company more to grow and produce raw sugar than to buy it;

(k) He personally knew nothing of the price of cane land and had made no investigation;

(l) He considered that the demand indicated that the public highly regarded the Company's stock, but granted that it dropped from \$30 in 1936 to \$8 in 1937, 1938, 1939; from 1939 to 1940 down to \$4.62; and rose in 1943 to \$9.87 and to \$10.25 in 1944; [827]

(m) He assumed good management of the plantation, but granted it was a speculative factor affecting profits;

(n) Loss of land permanently impaired ability of the remaining property to produce earnings commensurate with residual value;

(o) He agreed with the Company's President's statement to Congress that the Company with lands remaining could only be operated "inefficiently, expensively, and, therefore, uneconomically";

(p) He gave no dollar value to any of the factors he considered; and

(q) Defined a business loss to be a shrinkage of value not due to the property itself, but an intangible as distinguished from a tangible loss.

B. C. Campbell Crozier, an experienced local appraiser, currently Territorial Deputy Tax Commissioner in charge of assessments, after stating his general familiarity with the Plantation Company's prop-

erty, said that in his judgment upon a before and after taking basis, the Honolulu Plantation Company's physical properties, excluding movables and growing crops, had a 20% diminishing value, or were about \$1,000,000 less valuable after these takings.

In support of his opinion, Mr. Crozier stated that:

1. By the takings 1,087 acres of cane land had been lost, or 23% of the Company's cane acreage; and

2. He used the "\$1,000-an-acre rule", for it represented the amount of capital required to turn leased virgin land into irrigated cane land. So the before value was approximately \$4,000,000 and the after [828] value approximately \$3,000,000, as around 1,000 acres were taken away.

Upon cross-examination Mr. Crozier allowed substantially the same things as did Mr. Schmutz, that is, he conceded that he took into consideration generally in forming his judgment nearly all aspects of the Company on an over-all basis but to no particular item did he give any special weight or dollar-and-cents value. For example, he said that:

1. To the Company's earning record he generally gave some weight, but was not acquainted with the Company's losses;

2. He had a general familiarity with the Company's leases and assumed they were renewed in 1936, and considered the new capital invested in the leased land during the three years following;

3. He based his opinion essentially upon the loss of capital;

4. He considered the Company economically run though it bought raw sugar to refine for less than it could produce it itself;

On the nonexpert side there is the testimony of:

A. Philip E. Spalding, President of C. Brewer & Company, Ltd., agent for the Honolulu Plantation Company, who is also Vice-President and an attorney in fact of and for the Honolulu Plantation Company; and of

B. S. L. Austin, former manager of the Honolulu Plantation Company, now a Vice President of C. Brewer & Company, Ltd., and an attorney in fact for the Honolulu Plantation Company. [829]

A. Mr. Spalding testified that:

(1) Before the takings the mill had a potential of 22,000 tons of sugar per year, and of but 15,000-16,000 tons per year after these takings, and consequently the mill's operation became very expensive and it could not be operated as efficiently, lacking a year-round supply of cane, hence the mill's value was reduced;

(2) The takings had a little effect upon the Company's irrigation system and other improvements—indeed, all in all the takings made the Company an unprofitable economic enterprise;

(3) There was no market upon which at the time of these takings a plantation could be sold, but in 1943 he had tried to interest the Oahu Sugar Company in buying the Company, but not until late 1946 did he succeed in selling what was left to that company and then as of January 1, 1947;

(4) The takings started piecemeal under rights of entry, but later the Navy moved in without

rights of entry and things got so bad that he described the Company's grave position to Vice Admiral Ghormley, asking that the Navy buy the Company outright else it would have to appeal to Congress for relief, as it had no legal remedy available. (See Exhibit I.)

(5) The Company began to lose value on a descending scale as takings occurred until at some point it was pushed over the edge and became an uneconomic concern—an economic failure—and could no longer exist as a profitable company, hence its remaining property had much less value; [830]

(6) During the war, by special arrangements, the Company was able to keep going as it could buy raw sugar to refine from 28 local plantations. Ordinarily, these 28 plantations sent their raw sugar to their own refinery located at Crockett, California, where their cooperative known as the California and Hawaiian Corporated operated a refinery. For this period to supply the Army and Navy in the Pacific with white sugar, all plantations sold their raw sugar to the Company, as it had the nearest and only sizable refinery in Hawaii. In time of peace the Company could buy raw sugar locally from only one plantation, and that in a quantity insufficient to utilize the mill's capacity.

B. Mr. Austin's testimony as to value was similar to Mr. Spalding's, though in greater detail as to the sugar process and specific items and figures. But on the point under consideration he stated specifically that before the takings the Honolulu Plan-

tation Company was worth \$4,300,000 and only \$3,300,000 after, a loss of \$1,000,000. Mr. Austin, too, used the \$1,000-an-acre rule of thumb used locally by plantation men.

There can be no doubt that by these thirteen piecemeal takings of 1,087 acres of cane land upon which the Honolulu Plantation Company had leases, the Company has suffered a fatal blow. To be sure, as the takings continued the Company could well foresee that postwar it economically faced "impending death." (See Exhibit I.)

But this, it must be remembered, is an action at [831] law confined under the Fifth Amendment to rigid rules requiring the Government to pay just compensation only for what it takes. Equitable principles, no matter how well founded, are rendered inoperative in a condemnation proceeding. The slight intimation in *United States v. General Motors*, 323 U.S. 373 (1945), that there may be a small area wherein, upon unusual facts, equitable principles become operative, has by succeeding cases been narrowly confined. See *United States v. Petty Motor Co.*, 327 U.S. 372 (1946).

The parties do not dispute the law. They take issue only as to what the evidence establishes.

It is conceded that where but a part of an owner's property is taken he may recover in a condemnation proceeding not only the fair market value of the land taken, but also for any decrease in the value of the untaken part of the land unit. See *United States v. Miller*, 317 U.S. 369, 376 (1943), 147 A.L.R. 55, and cases there cited.

And it is agreed that in a condemnation case a landowner cannot be compensated for business losses. Upon a balancing of conflicting public and private interests, the courts have consistently held over the years that indirect losses and consequential damage must be borne by the private property owner, and not by the United States. In *Mitchell v. United States*, 267 U.S. 341 (1925), the Supreme Court said on this point, at p. 345:

. . . The settled rules of law, however, precluded his considering in that determination consequential damages for losses to their business, or for its destruction. *Joslin Manufacturing Co. v. Providence*, 262 U.S. 668, 675, Compare *Sharp v. [832] United States*, 191 U.S. 341; *Campbell v. United States*, 266 U.S. 368. No recovery therefor can be had now as for a taking of the business.

And in *United States v. Petty Motor Co.*, 327 U.S. 372, 377 (1946), the Supreme Court stated:

The Constitution and the statutes do not define the meaning of just compensation. But it has come to be recognized that just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called "market value." It is recognized that an owner often receive less than the value of the property to him but experience has shown that the rule is reasonably satisfactory. Since "market value" does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense

of relocation and other such consequential losses are refused in federal condemnation proceedings.

While in the Baetjer case, 143 F. 2d 391, 395 (C.C.A. 1st 1944), the same rule is recognized in this language:

The "just compensation" guaranteed by the Fifth Amendment "is for the property, and not to the owner" (*Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326, 13 S. Ct. 622, 626, 37 L. Ed. 463), that is to say, "the sovereign must pay only for what it takes, not for opportunities which the owner may lose" (*United States v. Powelson*, 319 U.S. 266, 282, 63 S. Ct. 1047, 1056, 87 L. Ed. 1390) so that, as a result, "There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment." *Id.* 319 U.S. at page 281, 63 S. Ct. at page 1055, 87 L. Ed. 1930; *Mitchell v. United States*, 267 U.S. 341, 345, 45 S. Ct. 293, 69 L. Ed. 644, and cases cited.

Defendant, however, relies upon other language in the Circuit Court's opinion in the Baetjer case. The Baetjer case came to the appellate court from the federal district court for Puerto Rico, and the facts of the case are very similar to the facts here in that a sugar plantation using various scattered fee-owned parcels as an agricultural unit was involved, the Government had taken some of its land and it endeavored to recover [833] severance damage for the decreased value of the remaining physical properties, especially its mills. The district court excluded certain evidence and ruled against

Baetjer and the other trustees of Eastern Sugar Associates. In so doing the Circuit Court said (143 F. 2d 391, 396):

. . . If it [the excluded evidence] means that after the taking the appellants' mills had an uneconomic over-capacity so that they could not be operated by the appellants as efficiently and therefore as profitably as before the taking, then the stricken evidence shows only a loss to business which resulted as an unintended incident of the taking and so a loss not compensable under the doctrine of *Mitchell v. United States*. *supra*. On the other hand, if it means, and there is other evidence tending to show that this is what the witness who used the phrase meant by it, that the over-capacity of the mills with respect to cane lands available to supply them has depreciated their value on the market . . ., then the evidence would tend to show a compensable loss. In short, the stricken evidence would indicate a compensable loss only if it means that after the taking the appellants' mills had an uneconomic over-capacity so that they could not be operated by anyone as efficiently and therefore as profitably as before the taking, this being a matter which a hypothetical willing buyer would consider in determining what he would pay for the property.

Under these instructions upon remand, the lower court received the hitherto excluded evidence and upon the issue also evidence tendered by the Government, and thereafter held that though there had been a legal severance of the scattered lands

which had been operated as a unit, the owner had failed to prove that the damage suffered by the severance was compensable. The loss suffered, it declared, was a noncompensable business loss. *United States v. 7936.6 Acres*, 69 F. Supp. 328 (U.S.D.C. Puerto Rico 1947).

Here, to say the least, the situation is confusing. First, the evidence reveals that this claim forward a part of a larger claim made to the 79th Congress, and the Company represented to Congress in unmistakable [834] language that it was asking for relief at its hands because it had suffered a capital or business loss for which it had no remedy at law.

Secondly, though a prudent buyer, to be sure, would take general note of all the factors mentioned by the experts, nevertheless stripped of all the generalities, the experts essentially base their judgment upon the same point as the former plantation manager, that is, all said that the Company suffered a capital loss at the rate of \$1,000 per cane acre as it takes that number of dollars to turn virgin land into land capable of growing sugar cane successfully. Thus far, as before Congress, the Company is talking the language of a capital loss. But here it takes a step beyond, and

Thirdly, envelopes itself in the language of the Baetjer case. At this point the witnesses, carrying forward the picture of what has happened, theoretically place what is left upon the block in the market place and then, viewing it from the eyes of a buyer, say with the First Circuit Court that it is not worth the amount of invested capital which

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it represents but something substantially less, and therefore what has happened to the Company has depreciated the value of its remaining property.

It would seem that as if by magic a noncompensable capital loss has now become a loss of real property value.

Very definitely the witnesses here meant what the First Circuit Court considered in that case a witness might have meant by "in value of excess equipment." Here all the evidence and the only evidence, as given by two [835] expert appraisers and two men experienced in plantation affairs, is that the over-capacity of the mill due to the limited acreage available to supply it not only made the Company economically unprofitable but those same facts depreciated the market value of the remaining property, for a buyer being able to do no better than the Company could in this situation would pay less, at the rate of \$1,000 an acre for each cane acre taken, for what was left of the plantation's physical property and its permanent improvements.

Although not a little disturbed by the facility by which an admitted capital or business loss is transformed into a loss of real property value, theory must yield to the reality of the market price where values are established.

The ascertainment of the fair market value, or here in the absence of a market for sugar plantations, of "fair value" in a condemnation proceeding is a very practical matter. While it is true that after these takings what was left was in just

as good a condition, generally, as it had been the day before, it does not necessarily follow that it therefore is just as valuable. It is plain common sense that a buyer would pay for property what it is worth to him—buy at a figure at which he could reasonably foresee making a profit upon his investment. Considered in this practical light, I am satisfied by the evidence that the Company has proven its claim that its remaining property decreased in value at the rate of \$1,000 an acre for each cane acre taken. [836]

Because in its representations to Congress the **Company** made a mistake of law in interpreting its facts, I do not believe that its right to recover upon the strength of the Baetjer case should be barred. It still remains true that by the takings it suffered a capital loss, but as that, in turn, directly affected the value of the remaining property, severance damage occurred and may be recovered here.

#### IV-A

Should the measure of damage be applied to 1,087.59 acres?

So far it has been assumed that the Company had long-term leases upon the land which it operated as an agricultural unit and that those leases allowed it to claim severance damages. The Government questions both of these representations made by the Company.

The breakdown of the 1,087.59 lost acres as to sources is to be found in Exhibit 6 and the leases themselves in the Exhibit 9 series—leases which interestingly reflect that the land situation in Ha-

waii gives leasehold plantation companies as much trouble as do their agricultural and marketing problems.

Exhibit 9-A is a lease from L. L. McCandless. This 30-year lease expired without right of renewal on December 31, 1939. A tenancy at will existed thereafter, for on August 18, 1941, Mr. McCandless having died, the representatives of his estate approved a continuation of the tenancy at will for an indefinite period, but for no longer than the duration of the probate administration of the estate because thereafter Mr. McCandless' property [837] was to be handled by a trust created under his will. There is no evidence that the probate had been concluded and that a new lease had been obtained from the McCandless trust. Presumably, then, the Company remained in possession as a tenant at will.

Exhibit 9-B is a lease from McCandless, expiring without right of renewal on August 31, 1944, and containing certain restrictions. This lease expired about two months after the agreed date of taking (June 21, 1944). Like Exhibit 9-A, this lease has no condemnation clause.

Exhibit 9-C is also a McCandless lease, expiring without right of renewal on December 31, 1944. It contains a clause that at the end of the term "or other sooner determination" the lessee should surrender the premises and all improvements thereon. The lease contains no specific condemnation clause.

Exhibit 9-D is an extended lease from Francis H. I. Brown, expiring without right of renewal on

September 30, 1946, but subject to cancelation upon 90 days' notice in writing and in that event the lessee could have time to harvest crops. The lease contains no specific condemnation clause or clause as to improvements.

Exhibit 9-E is an extended lease from Noa W. Aluli, expiring without right of renewal on December 31, 1948. The lease contains no specific condemnation or improvement clause.

Exhibit 9-F is a sublease from Oahu Sugar Company of Bishop Estate Land, running for 24½ years from January 1, 1941. It is not assignable without the [838] sublessor's consent, and it has a general termination clause and a specific condemnation clause providing that in that event the leasehold estate shall terminate and the lessee shall not have a right to claim compensation against anyone, but that all compensation shall go to the sublessor exclusively.

Exhibit 9-G is a 25½-year lease from the Bishop Estate from July 1, 1940, containing a specific condemnation clause reserving in the lessee the right in its own behalf to claim severance damage.

Exhibit 9-H is a lease from the Austin Estate for 25 years from January 1, 1941, which contains a condemnation clause similar to the one in Exhibit 9-G.

Exhibit 9-I is a 25½-year lease from July 1, 1940, from the Oahu Railway and Land Company, assigned by it to its subsidiary, The Hawaiian Land & Improvement Company, Limited, with a like condemnation clause.

Exhibit 9-J is a lease from the Queen Emma Estate for 29 years from January 1, 1937, which also has a like condemnation clause.

Exhibit 9-K is an alleged lease from the Damon Estate. The Company claims that by two letters attached to the Exhibit, the lease which expired in 1943 was extended for 10 years, or until December 31, 1953. These letters and also other letters (Exhibits A, E, F, G and H) reveal that all of the terms and conditions of the proposed lease had been settled, but that the parties expressly contemplated the execution of a written lease, which was never done. Nor did the Company ever seek specific performance of the contract, though it did [839] submit to the Estate a proposed form of lease. The Estate indicated on August 15, 1941, that it rejected the Company's form, and meanwhile condemnation actions affected the agreement and also the Estate indicated in the letter that it wanted to make certain changes in the basic agreement. On August 21, 1941, the Company rejected the proposed changes and said that the condemnation of certain areas of land covered by the October 21, 1940, agreement created no problems, for as a matter of law the agreement was subject to such a contingency, and wrote that it held the Estate to its agreement. See Exhibit 18. During 1943, the manager of the land department of C. Brewer & Company, Ltd., in behalf of Honolulu Plantation Company, by letters (Exhibits G and H) acknowledged that the Company's Damon Estate lease was to expire on December 31, 1943.

After that date the Company seems to have remained in possession as a tenant at will under the old lease, which oddly contained no condemnation clause—nor more strangely did the draft of the proposed new lease (Exhibit B). It is of interest to note that between 1941 and 1943 more takings by the Government of Damon lands involved in the proposed lease were occurring, so that it was becoming possible to include less than a hundred acres in the new lease, whereas the old one had originally covered nearly a thousand acres. Perhaps for this reason the Company never brought suit for specific performance of its contract to lease the lands covered by the agreement, but not condemned.

The leases in the Exhibit 9 series, which are the leases upon which the Company relies, do not wholly [840] support its position. To repeat, for purposes of orientation, the Company bases its claim upon the representations that:

(a) In 1936 it renewed its four major leases to 1965, except as to one, its Damon lease, which was said to have been extended to 1953; invested over one million dollars of new capital; and thus in effect became a new enterprise:

(b) Before these 13 takings it had 4,397.34 acres of cane land under cultivation and afterwards only 3,309.75 acres, a difference of 1,087.59 acres, which decreased the value of what remained at the rate of \$1,000 per acre.

The leases upon which the Company relied do not bear out these figures. The prospect, based on

prior dealings over the years with the same lessors, of being able to obtain renewals of expired leases even at greater cost, while a good prospect, did not, nevertheless, create in the Company a new estate in the lands or give it a legal right to cause such to come to pass. *Emery v. Boston Terminal Co.*, 178 Mass. 172 at 185, 59 N.E. 763 (1901).

Upon leaseholds affected by the takings, 440.175 acres of cane land out of the 1,087.59 acres lost can be relied on to measure the severance damage, for they were a part of a larger acreage in which the Company did have substantial leasehold estates. That is, it had at the consolidated date of taking (June 21, 1944) long-term leasehold estates under terms permitting it to claim severance damage in lands leased from: [841]

1. The Queen Emma Estate, from which taken in these proceedings were (Exhibit 9-J).....	21.79	acres
2. The Bishop Estate, from which taken here were (Exhibit 9-G) .....	311.833	acres
3. The Oahu Railway and Land Company, from which taken here were (Exhibit 9-I).....	103.64	acres
4. Plus land owned in fee by the Company, from which taken here were .....	2.912	acres
Total.....		440.175 acres

Dismissed from consideration in applying the rule of damage are the following:

a. The Aluli lease (Exhibit 9-E) simply because it does not enter into the calculations totaling 1,087.59 acres lost and upon which the Company bases its claim.

b. The Oahu Sugar Company lease (Exhibit 9-F), of which 48.61 acres, though forming a part

of the 1,087.59 acres, cannot be included because by its condemnation clause the Company is not entitled to severance damage.

c. The three McCandless leases (Exhibits 9-A, 9-B, 9-C), of which 3.795 acres form a part of the 1,087.59-acre claim, because the Company had no substantial estate in these lands as the leases had expired without right of renewal and the Company was in possession merely as a tenant at will.

This leaves the question as to whether or not the so-called Damon lease (Exhibit 9-K) can be included in computing the severance damage at the rate of 595.01 acres.

The known facts are that:

1. The old Damon lease expired December 31, 1943. It had no condemnation clause. [842]

2. Anticipating the expiration of the then existing lease, on October 18, 1940, the trustees of the Damon Estate offered in writing (Exhibit 9-K) to enter into a new lease with the Company upon terms specified for a period of ten years from January 1, 1944. The offer disclosed that due to anticipated condemnation proceedings not all of the lands involved might be available for lease.

3. By letter dated October 21, 1940, the Company accepted the Estate's offer. (Exhibit 9-K)

4. By the terms of this contract both parties had expressly in mind the execution of a formal lease. This was never done, nor did the Company ever bring suit for specific performance.

5. The Company submitted a proposed formal lease (Exhibit B), which like the old lease had no condemnation clause.

6. The Estate began to hedge in view of condemnation actions anticipated in October 1940, which had by August 21, 1941, become realities, and indicated that the Company's proposed lease was not satisfactory for various reasons. (Exhibit E)

7. The Company on the same date notified the Estate that it held it to its contract and that by law, of course, condemned acres would be excluded from the lease. (Exhibit 18)

8. During 1943 the Company acknowledged that its old lease expired December 31, 1943. (Exhibits G and H)

9. Subsequent to the agreement of October 1940, the Company notified the Estate that in reliance thereon it [843] had done certain things to and on the land. (Exhibit C). The Company, in reliance upon the so-called new lease, had planted new crops, prepared new cane fields, and put more money into the irrigation system. It is said in reliance upon the October 1940 agreement the Company invested \$75,000 in the Damon lands, and when the old lease expired it paid the Estate the rent called for by the 1940 agreement and the Estate accepted it.

Just how many Damon acres the Company had upon the date of taking (June 1944) is not made clear. All that appears is that Exhibit O, Tables XIII and XIV, shows that in 1939 the Company had 977.5 acres of Damon Estate cane land; that by the end of 1943 condemnation actions had reduced the acreage to 208.46 acres and by the end of 1944 to 64.75 acres.

This is interesting, especially as it probably explains why the Company never sought specific performance of its 1940 contract, but it is of no importance. This is so because by the consolidation order—oddly consented to by the Government—all of these thirteen takings must be deemed to have occurred on June 21, 1944. Therefore, on that day upon this artificial basis the Company must have had more acreage than it lost.

In the light of the consolidation order the real question is, therefore: Did the Company have on June 21, 1944, such an interest in the remaining land held by it under the Damon title as to entitle it to severance damage?

Relying upon *Wong Kwai v. Dominis*, 13 Haw. 471 [844] at 477 (1901), the Company contends that it had by reason of the October 1940 agreement not merely a contract for a lease but actually a new lease for 10 years upon the Damon lands. With this contention the Government, of course, disagrees.

The facts, in my opinion, dictate a negative answer to the question above stated.

Whether here there is a lease or an executory contract for a lease depends essentially upon the intention of the parties, as gathered from the terms of their October 1940 agreement. If it is a lease, the Company acquired an estate in the lands for 10 years from January 1, 1944. If it is not, it acquired simply an executory right to compel the Damon Trustees to convey to it such an estate, for breach of which contract the Company could re-

cover damages or sue for specific performance. *Dan Cohen Realty Co. v. National Savings & Trust Co.*, 36 F. Supp. 536 (E. D. Ky. 1941), affirmed 125 F. 2d 288 (C.C.A. 6th 1942); *Thompson on Real Property* (1940), Vol. III, Sec. 1214 et seq.; *Tiffany, Landlord and Tenant*, Vol. I, p. 371; 32 *Am. Jur.* "Landlord and Tenant", Sec. 28 et seq.

The law of Hawaii on this subject is in accord. See *Larrisich v. Schaefer*, 6 Haw. 140 (1875), and the case of *Wong Kwai v. Dominis*, *supra*, upon which the Company relies and which the court said was "a case of unusual difficulty," actually stands for no different proposition of law. The language from that case upon which the Company no doubt relies:

. . . The fact that a formal lease was contemplated did not prevent the letter and the acceptance of [845] its terms from constituting a final binding contract, the preparing and signing of the lease being merely in execution of the contract . . .

gives the Company but passing comfort, as all of the authorities agree that in a factual situation of the type with which we are here concerned the answer to the question of whether or not the facts spell out a lease or simply an agreement for a lease is dependent upon the intent of the parties. The fact that the parties contemplate executing in the future a formal lease does not, of course, prevent the agreement itself being a lease if such was the intention of the parties, as clearly manifest by the facts. On the other hand, dependent upon the

facts, of course, such a provision for the execution of the lease in the future may be some evidence that the parties did not by the agreement then and there intend a present demise of the premises.

A close examination of the facts shows that while it is true that all of the terms were generally specified in abbreviated style or were readily ascertainable with reference to other facts, nevertheless the agreement speaks not in terms of a present demise of an estate to begin at a future date, but, on the contrary, reveals an agreement to later execute a lease. As before noted, the fact that the parties expressly, as here, contemplate the execution of a formal lease does not in and of itself prevent an agreement from being a lease if such is the parties' intent and if they regard the formal lease as simply a reassurance. But unless that is apparent—and it is not here—the provisions for the execution of a lease with covenants upon the basis of the agreed [846] upon terms is strong evidence that the agreement was not intended by the parties to be the lease. Here the offer concluded: "If these terms are agreeable a formal lease can then be drawn up," and the acceptance concluded: "We will prepare a tentative form of lease for submission to you."

More importantly, the agreement does not speak in terms of a present demise. The Estate indicated that it was "willing to lease," referred to the "land to be leased" and to certain areas "to be surrendered" by the Company, said what the rent was "to be" "if" the Sugar Act continued.

And the acceptance of the offer spoke of the lands "to be leased." All in all, by the language used by the parties the emphasis is not upon then and there creating an estate, but is upon what they bound themselves to do, respectively, in the future when executing a lease. (See letters attached to Exhibit 9-K.)

This conclusion is attested to by the subsequent acts of the parties. For instance, by its August 15, 1941, letter (Exhibit E) the Estate said: "Due to our inability now to lease [certain condemned lands] . . . the Trustees . . . now propose to lease . . ." and there is other like language in Exhibit E. In rejecting the Estate's attempt to vary the terms of the agreement, the Company spoke (Exhibit 18) not of a lease, but of "a binding agreement." Indeed, the draft lease submitted by the Company (Exhibit B) is perhaps the best evidence that the Company itself did not regard the agreement as the lease, as the date is left blank and certain covenants from the old lease not mentioned in the 1940 contract [847] are inserted.

Strong as is the Company's equity, the facts do not support its position that it had a new ten-year lease of Damon lands from January 1, 1944.

At best, having remained in possession after December 31, 1943, and thereafter having paid the yearly rent called for by the October 1940 contract, the Company had a year to year tenancy, with a right to sue for specific performance. An estate in that indefinite condition, involving the purchase of a law suit, would not be attractive to a buyer.

For these reasons, I do not believe that the Company had an estate in the Damon lands which supports its claim for severance damage with respect thereto at the rate of \$1,000 per acre. Whether or not at a different rate it might have been entitled to severance damage for acreage remaining after these takings on which the Company had leases with but a very short time, comparatively, to go and without having a right of renewal and with respect to other lands which it held on a year to year basis as a tenant at will (Exhibits 9-A, 9-B, 9-C) is a subject upon which there is no proof and therefore no award as to such lands can be made.

Accordingly severance damages may be measured upon the basis of 440.175 acres only.

## SUMMARY

### I.

Civil No. 521	Parcel 2A .....	\$	100
Civil No. 521	Parcel 2B .....		75
Civil No. 529	Parcel F-1, as follows:		
	The land alone .....	\$	770
	The degree to which the pump house and four wells enhanced its value .....	\$23,000	
	The frame house .....		768
	The sheds .....		100
		<hr/>	
		Total.....	\$ 24,638
Civil No. 529	Parcel F-2 .....		75
Civil No. 535	2.732 acres .....	\$	14,100

## II.

Civil No. 529	For the part of the ditch on Oahu Rail- way and Land Company land.....\$	6,185
Civil No. 529	For the part of the ditch on Bishop Estate land .....	9,400

## III.

Civil No. 535	No award, for failure of proof, as to pre- paid rent.
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## IV.

Severance damage upon the basis of 440.175 acres.....	\$440,175
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Judgment approved as to form in conformity here-  
with will be signed upon presentation.

Dated at Honolulu, Territory of Hawaii, August  
22, 1947.

/s/ J. FRANK McLAUGHLIN,  
Judge.

[Endorsed]: Filed Aug. 22, 1947. [849]

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[Title of District Court and Causes Nos. 514, 521,  
525, 527, 529, 532, 533, 535, 536, 540, 544, 548, 684.]

## JUDGMENT

The above entitled actions, by order of consoli-  
dation, in respect to this defendant, Honolulu Plan-  
tation Company, having duly come on for hearing  
before this Court, and said cause having been tried  
by the Court, jury waived, and pursuant to the  
decision of said Court filed herein on August 22,  
1947, said defendant is entitled to just compensa-  
tion as follows:

I.

Civil No. 521	Parcel 2A .....	\$ 100
Civil No. 521	Parcel 2B .....	75
Civil No. 529	Parcel F-1, as follows:	
	The land alone .....	\$ 770
	The degree to which the pump house and four wells en- hanced its value .....	23,000
	The frame house .....	768
	The sheds .....	100
<hr/>		
	Total.....	\$ 24,638
Civil No. 529	Parcel F-2 .....	75
Civil No. 535	2.732 acres .....	\$ 14,100

II.

Civil No. 529	For the part of the ditch on Oahu Rail- way and Land Company land.....	\$ 6,185
Civil No. 529	For the part of the ditch on Bishop Estate land .....	9,400
Severance Damages .....		440,175
<hr/>		
	Total.....	\$494,748

And it appearing to the Court from the record in this cause:

1. That on June 21, 1944, the stipulated date of taking under the order of consolidation entered herein, there was deposited into the registry of this Court the sum of \$155 as estimated compensation for the land in Parcels 2A and 2B in Civil No. 521 leaving a deficiency in the amount of \$20.00. [854]

2. On June 21, 1944, the stipulated date of taking under the order of consolidation entered herein, there was deposited into the registry of this Court

the sum of \$650.80 as estimated compensation for the land and improvements in Parcels F-1 and F-2 in Civil No. 529, leaving a deficiency on account of land and improvements in the amount of \$24,062.20.

3. On June 21, 1944, the stipulated date of taking under the order of consolidation entered herein, there was deposited into the registry of this Court the sum of \$1,366 as estimated compensation for the land in the Parcel containing 2.732 acres in Civil No. 535, leaving a deficiency in the amount of \$12,734.

Now, therefore, it is hereby ordered, adjudged and decree:

### I.

That the just compensation for said lands and improvements thereon and for severance damages, involved in the consolidated suit Civil Nos. 514, 521, 525, 527, 529, 532, 533, 535, 536, 540, 544, 548 and 684, is in the amount of \$494,748, with interest as hereinafter provided.

### II.

That to complete the payment of the full amount of the just compensation, the petitioner shall pay into the registry of this Court the sum of \$492,576.20, with interest at the rate of six per cent per annum from June 21, 1944 until paid into the registry of this Court.

It is further ordered that upon the deposit of the [855] deficiencies hereinabove adjudicated, the

Clerk of this Court be, and he is hereby authorized and directed to disburse the same to the defendant, Honolulu Plantation Company.

Dated: Honolulu, T. H., this 5th day of November, 1947.

/s/ WM. F. THOMPSON, JR.,  
Clerk of the United States District Court for the  
Territory of Hawaii.

The foregoing Judgment is hereby approved.

/s/ J. FRANK McLAUGHLIN,  
Judge of the United States District Court for the  
Territory of Hawaii.

[Endorsed]: Filed Nov. 5, 1947. [856]

[Title of District Court and Causes.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, Petitioner, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the entire final judgment of this Court in the above entitled actions, consolidated for trial in respect to the defendant Honolulu Plantation Company, entered on November 5, 1947, determining just compensation for land, improvements and severance damage as therein appears.

Dated Honolulu, T. H., this 3rd day of February, 1948.

UNITED STATES  
OF AMERICA,

By /s/ W. BRAXTON MILLER,  
Special Asst. to the Atty. Gen.

[Endorsed]: Filed Feb. 3, 1948.

[860]

[Title of District Court and Causes.]

NOTICE OF CROSS-APPEAL TO CIRCUIT  
COURT OF APPEALS FROM PART OF  
JUDGMENT

Notice is hereby given that the Honolulu Plantation Company, one of the defendants in these consolidated thirteen condemnation cases, cross-appeals to the Circuit Court for the Ninth Circuit from so much of the Judgment entered in this consolidation action on November 5, 1947 as disallows just compensation for severance damages suffered by this defendant through the taking of said defendant's property interest in 595.01 acres of cane land covered by those certain agreements executed by and between the Trustees of the Damon Estate and said defendant.

Dated February 3, 1948.

/s/ C. DUDLEY PRATT,  
Attorney for Cross-Appellant.

PRATT, TAVARES &  
CASSIDY,  
Attorneys at Law,

[Endorsed]: Filed Feb. 3, 1948.

[864]

[Title of District Court and Causes.]

**ORDER EXTENDING TIME TO DOCKET  
RECORD ON APPEAL**

For good cause shown and in the discretion of the Court,

It Is Hereby Ordered that Petitioner, United States of America, shall have ninety (90) days from February 3, 1948, the date of Notice of Appeal, to file the record on appeal in the above entitled case and to docket the same in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated Honolulu, T. H., this 26th day of February, 1948.

/s/ J. FRANK McLAUGHLIN,  
Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed Feb. 26, 1948.

[968]

[Title of District Court and Causes.]

ORDER EXTENDING TIME TO DOCKET  
RECORD ON APPEAL

For good cause shown in the discretion of the  
Court,

It Is Hereby Ordered that Defendant' Honolulu  
Plantation Company, Limited, shall have ninety  
(90) days from February 3, 1948, the date of No-  
tice of Appeal, to file the record on cross-appeal in  
the above entitled case and to docket the same in  
the United States Circuit Court of Appeals for the  
Ninth Circuit.

Dated Honolulu, T. H., this 4th day of March,  
1948.

/s/ J. FRANK McLAUGHLIN,

Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed March 4, 1948.

[872]

[Title of District Court and Causes.]

### STATEMENT OF POINTS ON APPEAL

1. The district court erred in holding that the Honolulu Plantation Company was entitled to severance damages.

2. The district court erred in making any award to the Honolulu Plantation Company on account of severance damages.

3. The district court erred in awarding the Honolulu Plantation Company \$440,175 as severance damages.

UNITED STATES  
OF AMERICA,  
Appellant.

/s/ A. DEVITT VANECH,  
Assistant Attorney General.

/s/ W. BRAXTON MILLER,  
Special Asst. to the Atty. Gen.,  
Honolulu, Hawaii.

/s/ J. F. COTTER,  
Attorney, Dept. of Justice,  
Washington, D. C.

[Endorsed]: Filed March 5, 1948.

[876]

[Title of District Court and Causes.]

## DESIGNATION OF RECORD ON APPEAL

The United States, appellant in the above-entitled causes, which were consolidated for trial, designates the following for inclusion in the record on appeal. For convenience, the 13 cases are referred to by their docket numbers. For the same reason, parts of the record as to matters arising after the cases were consolidated are treated together.

### Dates of Filing

1. Civil No. 514: Petition, June 21, 1944; Declaration of Taking, February 10, 1945; Judgment on Declaration of Taking, February 10, 1945; Answer of Honolulu Plantation Co., February 17, 1945.

2. Civil No. 521: Petition, July 17, 1944; Declaration of Taking, July 17, 1944; Judgment on Declaration of Taking, July 17, 1944; Answer of Honolulu Plantation Co., August 7, 1944; Amended Declaration of Taking, October 30, 1945; Judgment on Amended Declaration of Taking, October 30, 1945. [880]

3. Civil No. 525: Petition, August 10, 1944; Answer of Honolulu Plantation Co., November 2, 1944; Declaration of Taking, February 10, 1945; Judgment on Declaration of Taking, February 10, 1945.

4. Civil No. 527: Petition, August 28, 1944; Declaration of Taking, March 9, 1945; Judgment on Declaration of Taking, March 9, 1945; Answer of Honolulu Plantation Co., June 18, 1946.

5. Civil No. 529: Petition, September 8, 1944; Declaration of Taking, September 17, 1945; Motion for Order Amending Petition, September 17, 1945; Order Amending Petition, September 17, 1945; Judgment on Declaration of Taking, September 17, 1945.

6. Civil No. 532: Petition, September 16, 1944.

7. Civil No. 533: Petition, September 21, 1944; Declaration of Taking, August 13, 1945; Motion for Order Amending Petition, August 13, 1945; Order Amending Petition, August 13, 1945; Judgment on Declaration of Taking, August 13, 1945.

8. Civil No. 535: Petition, October 11, 1944; Declaration of Taking, August 27, 1945; Motion for Order Amending Petition, August 27, 1945; Order Amending Petition, August 27, 1945; Judgment on Declaration of Taking, August 27, 1945.

9. Civil No. 536: Petition, October 20, 1944; Motion for Order Amending Petition, February 27, 1945; Order Amending Petition, February 28, 1945; Declaration of Taking, August 20, 1945; Motion for Order Amending Petition, August 20, 1945; Order Amending Petition, August 20, 1945; Judgment on Declaration of Taking, August 20, 1945; Answer of Honolulu Plantation Co., June 18, 1946.

10. Civil No. 540: Petition, October 30, 1944; Declaration of Taking, October 5, 1945; Motion for Order Amending Petition, October 5, 1945; Order Amending Petition, October 5, 1945; Judgment on Declaration of Taking, October 5, 1945; Answer of Honolulu Plantation Co., June 18, 1946.

11. Civil No. 544: Petition, November 28, 1944;

Declaration of Taking, January 29, 1945; Judgment on Declaration of Taking, January 29, 1945.

12 Civil No. 548: Petition, January 18, 1945; Declaration of Taking, November 1, 1945; Motion for Order Amending Petition, November 1, 1945; Order Amending Petition, November 1, 1945; Judgment on Declaration of Taking, November 1, 1945.

13. Civil No. 684: Petition, December 6, 1945; Declaration of Taking, December 6, 1945; Judgment on Declaration of Taking, December 6, 1945; Motion for Order Amending Petition and Judgment on Declaration of Taking, April 22, 1946; Order Amending Petition and Judgment on Declaration of Taking, April 22, 1946; Answer of Honolulu Plantation Co., June 18, 1946.

14. Civil Nos. 514, 521, 525, 527, 529, 532, 533, 535, 536, 540, 544, 548, 684: Motion for Consolidation, February 17, 1945; Affidavit for Consolidation, February 17, 1945; Stipulation for Consolidation, February 17, 1945; Order for Consolidation, February 17, 1945; Stipulation, February 17, 1945; Judgment, February 17, 1945; Satisfaction of Judgment—Honolulu Plantation Co., February 19, 1945; Motion for Consolidation, October 9, 1946; Motion for Bill of Particulars, November 6, 1946; Order Granting Motion for Consolidation, November 14, 1946; Order for Consolidation, November 22, 1946; Order Denying Motion for Bill of Particulars, November 26, 1946.

Record of Proceedings at the Trial: Decision of the Court, August 22, 1947; Judgment, November

5, 1947; Government's Notice of Appeal, February 3, 1948. [883]

Statement of points upon which appellant relies.

This Designation of the Contents of the Record on Appeal.

UNITED STATES  
OF AMERICA,  
Appellant.

/s/ A. DEVITT VANECH,  
Assistant Attorney General.

/s/ W. BRAXTON MILLER,  
Special Asst. to the Atty. Gen.,  
Honolulu, Hawaii.

/s/ J. F. COTTER,  
Attorney, Dept. of Justice,  
Washington, D. C.

[Endorsed]: Filed March 5, 1948.

[884]



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[Title of District Court and Causes.]

STATEMENT OF POINTS ON  
CROSS-APPEAL

The points upon which cross-appellant intends to rely on this cross-appeal are as follows:

1. The District Court erred in finding that defendant, the Honolulu Plantation Company, did not have such a property interest in the land held by it under the Damon title as to entitle it to just compensation by way of severance damages under

the 5th Amendment of the Constitution of the United States.

2. The District Court erred in not finding that defendant, the Honolulu Plantation Company, was entitled to just compensation for severance damages suffered by said defendant through the taking of said defendant's property interest in 595.01 acres of cane land held by it under those certain agreements executed by and between the Trustees of the Damon Estate and said defendant.

3. The District Court erred in not awarding the Honolulu Plantation Company the amount of \$595,010 as just compensation for severance damages suffered by said defendant through the taking of said defendant's property interest in 595.01 acres of cane land held by it under those certain agreements executed by and between the Trustees of the Damon Estate and said defendant.

4. The District Court erred in not awarding said defendant the amount of \$1,035,185 as severance damages.

HONOLULU PLANTATION  
COMPANY,

By /s/ C. NILS TAVARES,  
Its Attorney.

Of Counsel:

PRATT, TAVARES &  
CASSIDY.

[Endorsed]: Filed March 15, 1948.

[888]

[Title of District Court and Causes.]

**DESIGNATION BY CROSS-APPELLANT OF  
ADDITIONAL PORTIONS OF RECORD ON  
APPEAL**

The Honolulu Plantation Company, cross-appellant and appellee in the above consolidated proceedings, designates the following matters to be included in the record on appeal in addition to the matters designated by the appellant.

1. Honolulu Plantation Company's Notice of Cross-Appeal.
2. Statement of points on which cross-appellant intends to rely.
3. Government's Order Extending Time to Docket Record on Appeal.
4. Honolulu Plantation Company's Order Extending Time to Docket Record on Appeal.
5. This Designation.

**HONOLULU PLANTATION  
COMPANY,**

By /s/ C. NILS TAVARES,  
Its Attorney.

Of Counsel:

**PRATT, TAVARES &  
CASSIDY.**

[Endorsed]: Filed March 15, 1948.

[892]

[Title of District Court and Causes.]

### STIPULATION

Whereas by Orders of Consolidation dated February 17, 1945, and November 22, 1946 respectively, the above entitled cases were consolidated, and upon the trial thereof, a single finding was made of severance damages and one judgment entered for the said consolidated cases; and

Whereas the United States of America has filed Notice of Appeal in said consolidated cases, and the Honolulu Plantation Company has filed Notice of Cross-Appeal in said consolidated cases;

Therefore It Is Stipulated and Agreed by and between the United States of America by W. Braxton Miller, Special Assistant to the Attorney General, and the Honolulu Plantation Company by its attorneys, Pratt, Tavares & Cassidy, that said Orders of Consolidation shall continue in full force and effect to the final disposition of said consolidated cause in the appellate courts, that but one appeal be prosecuted in said consolidated cases, that one bond for costs on Cross-Appeal be filed, that a single record be printed, and that all orders, courts be similarly consolidated and effective as single orders, judgments and mandates, fully ef-

fective and applicable to all of the cases so consolidated as one cause.

Dated Honolulu, T. H., this 18th day of March, 1948.

UNITED STATES  
OF AMERICA,

By /s/ W. BRAXTON MILLER,  
Special Asst. to the Atty. Gen.

HONOLULU PLANTATION  
COMPANY,

By PRATT, TAVARES &  
CASSIDY,

By /s/ C. NILS TAVARES,  
Its Attorneys.

[Endorsed]: Filed March 19, 1948.

[896]

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[Title of District Court and Causes.]

ORDER

Now this 19th day of March, 1948, there appearing the United States of America, by W. Braxton Miller, Special Assistant to the Attorney General, and the Honolulu Plantation Company, by its attorneys, Pratt, Tavares & Cassidy, and it appearing to the Court that said parties have entered into and filed a stipulation herein pertaining to the appeal of the above entitled cases, and it further appear-

ing that said cases have heretofore been consolidated by orders dated February 17, 1945, and November 22, 1946 respectively, and good cause therefor appearing,

It Is Hereby Ordered that said Orders of Consolidation shall continue in full force and effect to the final disposition of said consolidated cause in the appellate courts, that but one appeal be prosecuted in said consolidated cases, that one bond for costs on Cross-Appeal be filed, that a single record be printed, and that all orders, judgments and mandates made by said appellate courts be similarly consolidated and effective as single orders, judgments and mandates, fully effective and applicable to all of the cases so consolidated as one cause.

/s/ J. FRANK McLAUGHLIN,  
Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed March 15, 1948. [900]

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[Title of District Court and Causes.]

### BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That we, Honolulu Plantation Company, a California corporation, authorized to do business in the Territory of Hawaii, as principal, and Columbia Casualty Company, a New York corporation authorized to do business in the Territory of Hawaii, as surety, are held and firmly bound unto United

States of America, petitioner above named, in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said United States of America, for which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Signed and Sealed with our seals and dated this 13th day of March, 1948.

Whereas on November 5, 1947, in an action in the United States District Court for the Territory of Hawaii, between United States of America as petitioner and Honolulu Plantation Company as defendant, a judgment was rendered, a portion of which disallowed just compensation for severance damages suffered by said defendant through the taking of said defendant's property interest in 595.01 acres of cane land held by said defendant under those certain agreements executed by and between the Trustees of the Damon Estate and said defendant, and the said defendant having filed a Notice [904] of Cross-Appeal from such portion of said judgment to the United States Circuit Court of Appeals for the Ninth Circuit;

Now, Therefore, the condition of this obligation is such that if the said defendant shall prosecute its cross-appeal to effect and shall pay costs if the cross-appeal is dismissed or the judgment affirmed, or such costs as the said Circuit Court of Appeals may award if the judgment is modified, then this obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof, the above bounded princi-

pal and surety have caused these presents to be duly executed this 13th day of March, 1948.

(Seal)

HONOLULU PLANTATION  
COMPANY,

By /s/ P. E. SPALDING,  
Its Vice-President.

(Seal)

COLUMBIA CASUALTY CO.,

By /s/ F. K. GILLIS,  
Its Attorney-in-Fact.

'Territory of Hawaii,  
City and County of Honolulu—ss.

On this 13th day of March, 1948, before me appeared Philip E. Spalding, to me personally known, who being by me duly sworn, did say that he is the Vice-president of Honolulu Plantation Company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said Philip E. Spalding acknowledged said instrument to be the free act and deed of said corporation.

(Seal)

/s/ W. H. FULLAWAY,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My commission expires 3/21/49.

[905]

Territory of Hawaii,  
City and County of Honolulu—ss.

On this 13th day of March, 1948, before me personally appeared Kenneth Gillis, to me personally known, who being by me duly sworn, did say that he is the attorney-in-fact of Columbia Casualty Company, duly appointed under power of attorney dated the 8th day of October, 1947, which power of attorney is now in full force and effect and that the foregoing instrument was executed in the name and on behalf of said Columbia Casualty Company by said Kenneth Gillis as its attorney-in-fact; and said Kenneth Gillis acknowledged said instrument to be the free act and deed of said Columbia Casualty Company.

/s/ W. H. FULLAWAY,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My commission expires 3/21/49.

Approved as to form and sufficiency of surety.

(Seal) /s/ W. BRAXTON MILLER,  
Special Assistant to the Attorney General of the  
United States.

/s/ J. FRANK McLAUGHLIN,  
Judge of the above entitled Court.

[Endorsed]: Filed March 19, 1948.

[906]

[Title of District Court and Causes.]

ORDER FOR TRANSMITTAL OF  
ORIGINAL EXHIBITS

Upon motion of the United States of America appellant and Honolulu Plantation Company, Limited, appellee and cross appellant and good cause appearing therefore,

It is hereby ordered that the Clerk of this court is authorized and directed to transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, together with the transcript of record on appeal, all of the original exhibits offered in evidence and all of the original exhibits received in evidence at the trial of this cause with a request that the Clerk of the Circuit Court of Appeals return said original exhibits to this Court upon the rendition of final decision in the Circuit Court of Appeals.

Dated Honolulu, T. H., this 7th day of July, 1948.

/s/ J. FRANK McLAUGHLIN,  
Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed July 7, 1948.

[910]

[Title of District Court and Causes.]

REPORTER'S TRANSCRIPT OF RECORD

Mr. Vitousek: I'd like to call Mr. S. L. Austin.

STAFFORD L. AUSTIN,

a witness in behalf of the Defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Vitousek:

Q. What is your name?

A. Stafford L. Austin. [1172]

Q. And what is your position?

A. I am Vice-President, C. Brewer and Company.

Q. Mr. Austin, there has been placed in evidence in this case as Exhibit 4-B a power of attorney from Honolulu Plantation Company, P. E. Spalding, S. L. Austin and/or H. T. Kay—are you the S. L. Austin named in that power of attorney?

A. I am.

Q. How long have you been in your present position with C. Brewer and Company?

A. Oh, since September, 1944.

Mr. Driver: When?

The Witness: September 1, 1944.

By Mr. Vitousek:

Q. Prior to that date, what were you doing?

A. I was Manager of Honolulu Plantation Company.

(Testimony of Stafford L. Austin.)

Q. How long had you been Manager of the Honolulu Plantation Company?

A. Since July 1, 1939.

Q. And prior to July 1, 1939, what were you doing?

A. Manager of the Wailuku Sugar Company.

Q. And where is Wailuku Sugar Company?

A. On Maui.

Q. This Territory?           A. This Territory.

Q. And how long were you Manager of the Wailuku Sugar [1173] Company?

A. From February 1, 1932, to July 1, 1939.

Q. Prior to becoming Manager of the Wailuku Sugar Company, what were you doing?

A. I was Assistant Manager at Honolulu Plantation Company.

Q. How long had you been Assistant Manager?

A. I was Assistant Manager for three, a little over three years.

Q. And before that?

A. I was Division Overseer at Honolulu Plantation.

Q. And do you recall how long you were Division Overseer?

A. From about half and half—three years Division Overseer and three years Assistant Manager before I went—

Q. And were you with the plantation prior to becoming a Division Overseer for the Honolulu Plantation?

(Testimony of Stafford L. Austin.)

A. No, I was at the Hilo Sugar Company before that.

Q. What were you doing in Hilo Sugar Company?

A. I was Division Overseer at Hilo Sugar Company.

Q. Do you recall about how long you were in that position?

A. I was Division Overseer at the Hilo Sugar Company for approximately four years, and before that a luna in the various capacities on the plantation.

The Court: At Hilo Sugar?

The Witness: Hilo Sugar, yes. [1174]

Q. Did you start in the sugar work in the sugar industry in the Hilo Sugar?

A. No, prior to that I was at Waiakea on the Island of Hawaii.

Q. Did you attend college? A. I did.

Q. What were your major subjects?

A. Agriculture.

Q. Agriculture? And since leaving college can it be stated you have been with the sugar industry of Hawaii up to the present time?

A. That's a correct statement.

The Court: Is there some mystery about this college?

Mr. Vitousek: No.

The Court: What is it?

The Witness: Cornell.

Q. And where else?

(Testimony of Stafford L. Austin.)

A. University of Georgia.

Q. Mr. Austin, referring now to the Honolulu Plantation—I'll withdraw that question. What in general are your duties as Vice-President of C. Brewer and Company?

A. Well, as Vice-President of C. Brewer and Company I handle the plantation operations on all the plantations that they are agents for, being 12 in number.

Q. Well, Brewer and Company have a plantation department? [1175]

A. They have a plantation department and I am in charge of the plantation department.

Q. You are in charge of the plantation department? A. Yes.

Q. Since you left the Honolulu Plantation as Manager and became Vice-President of Brewer and Company has your work brought you in contact with the Honolulu Plantation? A. It has.

The Court: You will have to speak a bit louder.

The Witness: It has.

Q. And frequently or infrequently?

A. Frequently.

Q. Now, Mr. Austin, how many plantations are in the plantation department? In other words, how many plantations C. Brewer and Company are agents for? A. Twelve.

Q. Throughout the Territory?

A. Throughout the Territory.

Q. Honolulu Plantation is located where on this island?

(Testimony of Stafford L. Austin.)

A. At Aiea in the District of Ewa.

Q. That's sugar cane land it operates? Do you know the character of those holdings in general, fee or leasehold?

A. A part in fee and part in leasehold.

Q. Well, which is the greater part?

A. The greater part is in leasehold. [1176]

Q. What would it be characterized, in what way, what type of plantation?

A. An irrigated plantation.

The Court: Is there any other type in Hawaii?

The Witness: Unirrigated.

The Court: Which one is that?

The Witness: Well, all the plantations where they have no irrigation system.

Q. What are some of those?

A. On the Island of Hawaii—

Mr. Rathbun: Nature furnished it?

The Witness: Yes.

The Court: Rain.

Q. Now, the Honolulu Plantation has a mill, has it not? A. It has.

Q. Does it produce only raw sugar or produce other sugar?

A. It produces raw and refined.

Q. It produces both raw and refined?

A. Both.

Q. Is the processing carried on in one mill structure?

A. Processing is carried on under one mill roof. It is a process of moving from the raw right into

(Testimony of Stafford L. Austin.)

the refined without moving from one building into another.

Q. Now, I will ask you, Mr. Austin, for the purposes of this record, to described in general the properties acquired [1177] and particularly those used by the Honolulu Plantation Company comprising a sugar plantation?

A. Well, I will have to—

Mr. Rathbun: At this time, if your Honor please, I want to note an objection. This line of testimony on anything other than the cases involved here, the 13 cases, is wholly immaterial as far as anything appears.

The Court: Your objection may be noted and your exception may run to the line.

By Mr. Vitousek:

Q. Mr. Austin, in this last question I didn't mean to detail it. I mean in general what is necessary, property necessary in operating a plantation.

Mr. Rathbun: Just a minute. That calls for a conclusion. I object to it for that reason. If he wants to describe the property and the Court rules he can, that's different.

The Court: As I understand it, this question is different from the first. This is a general question asking him to describe in general terms what lands are needed to operate a sugar plantation, I presume in Hawaii and on this island.

Mr. Vitousek: No, that isn't the purpose of the question; the land, mill, and so on, what is necessary all together.

(Testimony of Stafford L. Austin.)

The Court: Anywhere?

Mr. Vitousek: Then we'll get into detail.

The Court: Anywhere? [1178]

Mr. Vitousek: On the Island of Hawaii and particularly the Honolulu Plantation.

The Court: Well, let's have the general first and follow it by specific. Do you have it in mind?

Mr. Rathbun: I do. But may I have this objection, without objecting specifically that objection will run?

The Court: That's right, together with an exception.

Mr. Rathbun: To no materiality other than to suits involved in this case?

The Court: That's right. And your exceptions will follow.

The Court: (To the witness.): Do you know the question? Do you know what you are being asked?

The Witness: Yes, I think I do.

The Court: All right.

A. In order to start a plantation it is necessary to have first land; then to have a—if it is an irrigated plantation, it is necessary to have a pumping plant, pipe lines, ditches, housing for you men, a mill, and all the facilities necessary to operate a mill; and the other tools, implements, and other paraphernalia that may be necessary to do all the weeding and cultivating of the land.

Q. Well, what about transportation of cane?

A. It would be necessary to have transportation facilities of one kind or another to get the cane to the mill.

(Testimony of Stafford L. Austin.)

Q. In coming to the mill, now, the mill that you described [1179] where the cane is processed into sugar, what in general is the plant required to accomplish the processing of sugar cane into sugar?

A. It is necessary to have first the carriers into the mill. Then you have a set of maybe 12, 9 to 12 rollers to mill, to grind up the cane. It would be necessary to operate this mill, turn it over. Then the pumps and equipment to pump the juice to the heaters; and the filters, to filter out the mud and debris; then you have the quadruple effects where you boil the juice and boil off the water and gradually get the massecuite, which is made up of both sugar and molasses. We have the vacuum pans where you make the sugar for the raw sugar and then for the low grade. We have centrifugals so that you can get to separate the molasses from the sugar. And in the case of the refinery you have your filters for filtering the raw juice and the centrifugals for processing the sugar, dryers, bagging equipment, and warehouse for warehousing the finished product; railroad system or trucking system to move the sugar from the warehouse to the port. Usually in the mill they have their own electrical plant for making their own electricity.

Q. Well, in order to get this more particularly, I will ask a question which may sound leading, if the Court please, but it is preliminary. Is the equipment that is the property of the Honolulu Plantation that generally used except for the [1180] fact that it refines white sugar for other plantations in the Territory?

(Testimony of Stafford L. Austin.)

A. It is generally used.

Q. Would then the general description you have given of the mill apply to the mill of the Honolulu Plantation? A. It does.

Q. Starting back at the land in the Honolulu Plantation Company, how long does it take to grow cane and produce the proper cane to be processed, sugar cane.

A. Anywheres from 18 to 14—anything over 20 to 24 is good. Anything less than that, we try not to get the age of cane any less than 18 months anyway.

Q. Well, then, after the first crop is produced, you produce other crops from root structure?

A. Ratoon crops from the same.

Q. How many?

A. Sometimes three, sometimes four, depending on the location, the kind of variety of cane and how well it grows.

Q. How long does it take to produce a ratoon crop from the time of the cutting to the next crop?

A. Relatively the same age.

Q. Relatively the same?

A. Yes, 18 to 24 months.

Q. How do you arrange so that you can produce a crop of cane for milling each year? [1181]

A. Well, you divide up your land, and usually you take about two-thirds of the land per year for crop. You have what they call a long crop and a short crop. And the short crop is the crop that is taken from, that you take off the first part, off the first part of the

(Testimony of Stafford L. Austin.)

year, and then take off at the last part of the year, of the following year, which gives it the 18 months or 20 months growth. And every two years then you have a crop coming on. In other words, in different areas. You divide up your land so that you have so much coming off each year.

Q. You cannot crop, then, each year the whole area that you would call cane land?

A. No, you can't. And you have to keep your crops in balance all the time so that you get a relatively same amount of sugar off each year.

Q. Now, you have described the mill and coming to the Honolulu Plantation Company in particular—I'll withdraw that. Mr. Austin, I show you Exhibit 3 which was introduced in evidence in this case. Have you seen that before?      A. I have.

Q. And what in general does that show?

A. This shows the Honolulu Plantation Company from the land standpoint as a whole. It shows the ditch system, the pumping system, and the area of cane land.

Q. Well, would you describe in more detail the pumping [1182] system, how it is operated, the irrigation system, how it is operated, the two together, describe it in your own words?

A. Well, from the standpoint of the Honolulu Plantation Company?

Q. Yes. And you can use this exhibit that I have handed you.

A. On the left of this map here there is shown a pumping plant. That's the Waiau station.

(Testimony of Stafford L. Austin.)

Q. Well, that has underneath it the wording "Waiau Station?"

A. That's right, Waiau Station. That's the electric pump in the Hawaiian Electric Waiau Station. Water—26 million gallons of water is picked up there by this pump and is pumped up to the booster station which is 180 feet above the Waiau plant. Twenty-six, that's 26 million. Then 19 million is picked up by that booster and pumped up to a second reservoir. There are two boosters, a booster here and a booster there. (Indicating on map.)

Q. From the Waiau that you pointed to as Waiau Station with a red line running up?      A. Yes.

Q. And the first dot is the booster pump, is that the first one you mentioned?

A. That's right. There's 26 million up to that pump, and there's a reservoir here. Nineteen million is picked up [1183] by this booster pump and boosted up to the second booster.

Q. That's also headed "booster pump?"

A. Yes. And then there are 7 million from there up to the reservoir, the last reservoir on that line. Every bit of this land has to be surveyed, and the amount of water required for a certain area worked out, and pumping and pipe line system and ditch system put into effect where the most efficient use of the water can be made on the area in question. The Honolulu Plantation Company has made a survey of the full pumping water requirements and have allocated pumping stations and pumping plants to the various areas that have underground water, and from

(Testimony of Stafford L. Austin.)

these areas water is pumped to the various heights on the plantation. The booster pumps are used on the higher levels to push the water up to 650 foot elevation. That's the highest point at the Honolulu Plantation where water is used, 650 foot level.

These pumps are not only electric pumps but in some cases steam and diesel operated. On the fee simple lands we have a pumping plant which we indicate as pumping plant number 5, which is right in the middle of the town of Aiea. This water is pumped up to 190 feet, which is to a reservoir above the mill. There's a 5-million gallon, 24-hour pump, which pumps the water up to the reservoir. Then there's three domestic water pumps that pump the water up to 230 feet, at which point there's a reservoir, and this water is used for domestic [1184] purposes in the camp. This water is also used for the area above the plantation, and that's Aiea Heights. That's where the people at Aiea Heights get their water.

The mill requires approximately 9 million gallons of water in a 24-hour period.

The Court: Once again?

A. The mill requires approximately 9 million gallons of water in a 24-hour period. Five million is supplied by pump 5.

Q. Just a moment, Mr. Austin. You say pump 5 and have been pointing to what is headed pumping plant? A. Yes.

Q. Could we have a figure five placed there? (Witness writes on map.) You put "5" within the square headed "pumping plant?" A. Yes.

(Testimony of Stafford L. Austin.)

Q. And that's pump 5 that you have been discussing? A. Yes.

Q. Go ahead, Mr. Austin.

A. The remainder of the water was brought in from either pump 3 or at the present time there's a pump 21.

Q. Will you mark pump 3 and pump 21?

A. Well, pump 21 is a new pump in here, which is not shown. (Indicating on map)

Q. Will you point 21 there where you put that red square? [1185]

(Witness writes on map.) All right, now where is 3?

A. Three is here. (Indicating on map)

The Court: Which is the one we saw when we went on view?

The Witness: Oh, that was pump 2.

The Court: Two?

The Witness: And 4. (Writing on map)

Q. Did I interrupt you? Will you continue with your description?

A. Now, on the Halawa side of the plantation, that is, towards Pearl Harbor in the valley, there are two pumping plants, pump 1 and pump 3. In pump 3 there are two electric units, one pumping 7 million gallons to 180 feet, and the other one pumping 9 million gallons to 315 feet. There's a booster pump in the pump 3 line which boosts that water from the 7 million gallon pump to the 315 foot level when there's not enough water being pumped from the 9 million. At pump 1 there's a big pump

(Testimony of Stafford L. Austin.)

that used to pump 29 million gallons of water, 19 from one—correction, 26 million gallons, 19 million from one pump and 7 from another, two units. Those two pumps are out of operation right now, owing to the fact that the land in this area has been taken.

The Court: What did you call those pumps?

The Witness: Number 1. These two pumps?

The Court: The ones you are talking about are out of operation? [1186]

The Witness: Yes, except for the pump that's been placed in there for Navy use when they desire water.

Q. Well, was that placed there after the suits involved here were filed?

A. Yes. This big pump, pump 1, supplied the area known as the Puuloa area. That's down along the main Kamehameha Highway to town. And to the Makalapa crater where there was some cane at one time. The pump 3 pump furnished water for the area which is now known as Red Hill or the Naval storage area, oil storage area. That's on Red Hill.

The Court: That supplied it when you grew cane there? The Witness: Yes.

The Court: But it does not now supply it?

The Witness: No. This whole system of pumps were worked out with a great deal of trouble and a great deal of effort on the part of the plantation to have an efficient pumping system, irrigation system throughout the plantation.

(Testimony of Stafford L. Austin.)

Q. Well, have you described all the pumps?

A. Well, I haven't. Pump 6 is a pumping plant that pumps 7 million gallons of water 180 feet. And that pump is in operation most of the time on a 24-hour basis, 5 days a week. And that water is taken up the ridge to the booster pump where it, the booster pump, carries it up to 650 foot level. That pump gets all its waters from open springs at Waiau. It doesn't take all the water because there's quite a bit of water running [1187] into the ocean there.

Q. You have mentioned these pumps in addition to the pumping plants. Are there any other buildings or dwellings about the pump as forming a part of the unit, operating unit?

A. There's—each one of them, each one of the pumps, has its own pumping building.

Q. And what else?

A. Camp area around it, surrounding it.

Q. What is the camp area used for?

A. For the housing of the people that operate the pumps.

Q. Now, you described the pumps and the pumping to various reservoirs. How is the water distributed to the fields?

A. Through main line ditches; and on a portion of the plantation from the Waimalu Gulch over to the edge of the plantation next to Waipahu the ditches, the main ditches, were concrete, concrete lined.

(Testimony of Stafford L. Austin.)

Q. Well, are there some ditches that are not concrete lined?

A. There are some ditches in this area, in the area on this side of the plantation.

Q. Well, by "this side" you mean, referring—

A. The Honolulu side.

Q. Where would be the Honolulu side, starting from where?

A. From this, from the Halawa Gulch, I mean the Waimalu Gulch. [1188]

Q. Spelled W-a-i-m-a-l-u?

A. Yes.

Q. On the Honolulu side of the Waimalu Gulch?

A. There are some areas where we didn't have any concrete ditches.

Q. And the other side?

A. They were almost all completed as far as the concrete ditches are concerned.

Q. Mr. Austin, you mentioned in your testimony a camp, camp site. Will you give us the general location of the camp sites, the number of buildings, as of the time prior to the first taking involved in these proceedings, 514, which is shown as filed June 21, 1944?

A. I will have to refer to—we have a pump 2, camp with two units, two houses; pump 4, camp with 8; Kalauao camp with 9; Halawa camp with 12; Mango tree camp, 31. Now, Mango tree camp is below the old Moanalua Highway, and is in the Aiea red area.

(Testimony of Stafford L. Austin.)

The Court: One house?

The Witness: No, there's 31. Then the main mill camp is 25. In the new mill camp is 98. In the lower Japanese camp is 90. In the skilled labor camp there's 30. In the main mill camp there's 73.

The Court: Just a minute.

Q. You mentioned two main mill camps, one 25, now you [1189] say 73.

A. Well, one is the main mill; that's below the road, for administrative—

Q. That's for employees in the administrative positions?

The Court: Which one?

The Witness: The main mill camp, 25.

The Court: All right.

A. Then in the new mill camp is—

Q. Wait just a minute. You had one main mill camp, 73. Where is that? And what employees occupy it?

A. Seventy-three, main mill camp is 73.

Q. Yes?

A. Well, that's in the main, in the middle camp just below the mill.

Q. Well, that's different from the 25 you mentioned? A. That's different.

Q. So it's in addition to those?

A. That's right.

Q. All right, go ahead.

A. Then we have a new mill camp, 70, Puerto Rican camp, 41. And on the—there's 11 more; the Mango tree camp on the other side of the road, if

(Testimony of Stafford L. Austin.)

you put that together with the Mango tree, that's 42 in the Mango tree camp.

Q. Well, now, in the new mill camp you gave 98. Now you said 70. Is that in addition to the 98?

A. That's in addition.

Q. That's for a different type of housing?

A. Yes.

Q. Go ahead.

A. Then there are four houses along the Aiea Village along the Government road. There are four houses there. Makalaini camp 16; Aiea stable camp, 18; and below the Government road skilled labor camp 12. That's the total number of houses on the fee area.

Q. Well, was there any sewage system or water system or electric light system for these camps?

A. Well, there was a sewer system in the skilled labor camp, main mill camp, new mill camp. lower Japanese camp, Puerto Rican camp, Mango tree camp, Kalauao camp, pump 2 and 4 camps, and the Makalaini camp. Then the electricity was connected to all of these camps.

Q. And where is that electricity generated?

A. Generated down in the plantation, but on a sort of a dual hook-up with the Hawaiian Electric. In other words, they have a stand-by in case of there was trouble on the Honolulu Plantation Company lines, any trouble in the Honolulu Plantation Company lines, why they have a stand-by with the Hawaiian Electric so that we always have power, electricity.

(Testimony of Stafford L. Austin.)

Q. Well, the sewerage system was installed and maintained by the plantation? [1191]

A. Installed and maintained by the plantation.

Q. How about the domestic water?

A. The domestic water is piped to all the homes. And as I indicated previously that pump 5—three pumps were operated on domestic water alone.

Q. You have described in general the machinery used to operate the mill. How was it housed? What is the character of the buildings in which it is housed? Just give a general description.

A. You have your main mill building, the electric power house, the sugar warehouse, raw sugar bin shed, bag shop, massecuite tank building, molasses tank building, laboratory, shop buildings, locomotive sheds, the yeast plant building, and a number of other small buildings.

Q. What is the type of construction of the mill building?

A. It's steel frame with iron galvanized iron siding.

Q. What type of floor?

A. Concrete floor.

Q. In regard to the machinery housed. For instance, first the rollers, what do you call that? Is that technically a mill? A. A mill, yes.

Q. That consists of the rollers?

A. Each one of those; there's three rollers to one mill.

Q. It's a train of rollers? [1192]

A. Yes, a train. We call it a mill train.

(Testimony of Stafford L. Austin.)

The Court: Train?

The Witness: T-r-a-i-n, yes.

Q. All right, speaking of the mill train, is that a heavy or light piece of machinery?

A. Very very heavy piece of machinery. And it's on very solid foundation.

Q. What type of foundation?

A. Concrete reinforced.

Q. You run this mill train with steam engines?

A. Steam engines, yes.

Q. What type of steam engines?

A. They are called coreless.

Q. Are they heavy? A. Very very heavy.

Q. And how are those—

A. Operated by steam. And they are set on solid foundations of reinforced concrete.

Q. Then steam is furnished from boilers, furnished from boilers? A. Yes.

Q. Just give us the general description of those?

A. Well, those are—they have five sterling boilers that are operated with gas; that is, the refuse that comes from the mill after the juice is all pressed out of the cane, [1193] that's by gas. And that trash goes into the boilers and from it you get enough steam to operate the mill.

Q. All right, now, how are they constructed in general?

A. What they call the sterling boiler, very heavy construction, and they have three drums with tubes in between, each one of those boilers is rated at 650 horsepower motor.

(Testimony of Stafford L. Austin.)

Q. Well, are they separate pieces or imbedded in concrete?

A. They are imbedded in concrete, and three of them are—heavy steel sides. In other words, they have a steel frame; to the steel frame are attached the fire-brick fabrics. And this steel frame is bolted down to solid concrete foundation.

Q. Before the cane gets into the mill train, there's some heavy—I'll withdraw that. There's a washing machine or a place where the cane was washed that we saw when we were out there the other day, is that right?

A. That's right.

Q. What type of construction is that?

A. That's a very heavy construction. It's down imbedded in concrete, reinforced concrete, pit and steel construction above the ground.

Q. You described also vacuum tanks in which the juice from the cane is boiled, is that right?

A. Yes, sir, correct.

Q. And how are these tanks constructed and held in place? [1194]

A. Well, they are standing on very heavy high beams and they are of cast iron construction with copper tubes on the inside.

Q. How about the centrifugals that you mentioned?

A. Well, they have to be on a very solid foundation because there's a great deal of vibration; to keep down the vibration they have to be on a very solid foundation with the frame work of steel, steel fabricated.

(Testimony of Stafford L. Austin.)

Q. Bolted, or how are they fastened to the foundations?

A. They are bolted to the foundation.

Q. Now, the machine shop that you mentioned, what type of machinery is in there?

A. Well, they have some heavy planers and heavy milling machines and drilling machines in there, lathes, all set on very heavy foundations and bolted down to it.

Q. How about the electric generating plant?

A. Electric generating plant is on a solid pedestal that goes down about 10 or 15 feet into the ground.

Q. What is that constructed of?

A. Solid concrete, and it's so done so that—the turbine has to be on very solid ground to keep it from vibrating.

Q. What is the yeast plant building? Does that have machinery in it?

A. That has machinery in it.

Q. What is the character of that machinery?

A. That's the—those are mostly tanks in that portion of the yeast plant.

Q. Heavy or light? What is the nature of it?

A. Some are heavy and some are light. They are not, it's not the same sort of machinery as used in the mills; a little bit on the lighter side.

Q. What is the raw sugar bin that you mentioned? What is the character of its construction?

A. The raw sugar bin is a big steel bin that was erected for the use so that you could haul

(Testimony of Stafford L. Austin.)

bulk sugar. This raw sugar is brought in in trucks and these trucks are backed into the bin and the sugar is dropped into these bins and then carried by conveyer into the mill.

Q. Well, that's for use in refining raw sugar you may buy?      A. That's it.

Q. What is the type of that construction?

A. That's very heavy construction, of steel and concrete foundation.

Q. How about the warehouses? Anything inside them or just plain buildings to store sugar?

A. Well, a sugar warehouse will take 10,000 tons of sugar when it's full. At the present moment there isn't much sugar.

Q. Do you have any machinery or equipment in there? [1196]      A. In the warehouse?

Q. Yes.

A. Only in the merchandise warehouse they have some machinery, spare parts, for the mill and for use around the factory.

Q. On the date I mentioned, June 21, I believe, 1944, did you have any railroads in use by the plantation?

A. Yes, they were all in use in the plantation.

Q. Describe them in general without giving the details. I don't mean the rolling stock. I am referring to the roads, the rails, the ties, road beds, and so on, trestles, whatever you may use.

A. Well, to every point on the plantation there is a main line, what we call the main line, ran so that as soon as the cane would come off certain

(Testimony of Stafford L. Austin.)

fields and we were harvesting them, we put portable tracking to the fields and the cars would be brought on the fields on the track and on to the main line; and on the main line they would be hauled into the mill. So this main line went all over the plantation.

Q. Well, have you any idea of the total mileage of main line, not the portable track, but the main line constructed railroad?

A. I'm not sure of the figure but I think there was 16 or 17 miles of main line.

Q. Will that include any bridges or trestles?

A. It includes bridges and trestles. Those bridges and trestles were great, big affairs, made of 12 by 12's and 16 by 16 lumber.

Q. Was it necessary to construct any roads throughout the plantation?

A. Well, they had a system of roads throughout the plantation.

Q. Well, describe it in general without giving each road, but give a general description.

A. These roads were run up each one of the ridges and from the main highway up into the fields, and they are usually of dirt construction. But it was necessary to keep them, to machine over them most of the time to keep them from getting full of pit holes. This was done usually once or twice a month in bad—when you are hauling cane over them or in bad weather.

Q. Well, by machine you mean road machinery?

A. Road machinery.

(Testimony of Stafford L. Austin.)

Q. To keep them in condition?

A. In condition, yes.

Q. And what were they used for?

A. Used for transporting fertilizer, men, equipment, around the plantation.

Q. Used in connection with the plantation activities? A. Activities, yes. [1198]

Q. In the camps that you have described were any roads constructed?

A. In every one of our camps we had roads running between houses, and all our camps were laid out with roads, necessary roads for easy access to the housing.

Q. Was it necessary to use any drainage system, construct any drainage?

A. Well, culverts and drains were necessary, the same as they are necessary in the city where they have any amount of run-off, especially at the Honolulu Plantation where you have the plantation situated on more or less of a hill.

Q. Did you have a hospital?

A. We had a hospital, yes.

Q. Why did you have a hospital? What was the purpose of it?

A. To take care of the health needs of the plantation people.

Q. Used in plantation activity?

A. In plantation activity, yes.

Q. Do you know the number of beds, the general size of the hospital? A. Thirty-six beds.

Q. Thirty-six bed hospital? A. Yes.

(Testimony of Stafford L. Austin.)

Q. Any other buildings used in connection with the [1199] operations of the plantation? Did you have a club house?      A. We had a club house.

Q. Where was that?

A. A gymnasium. We had a club house in the Filipino camp, a club house in the skilled camp, and a big gymnasium in the upper camp.

Q. Well, what were the purposes of those?

A. For recreational facilities and to help entertain and keep the people on the plantation.

Q. That is, the people employed on the plantation?

A. The people employed on the plantation.

Mr. Vitousek: If the Court please, I think this would be a convenient time to adjourn. We are going on into another subject which will take longer than the 15 minutes left.

The Court: Well, we might as well start it and utilize the time.

Mr. Vitousek: All right.

The Court: We might as well have this matter now as later.

By Mr. Vitousek:

Q. Do you have an office building in the plantation?

A. We have an office building which houses all the branches of the plantation work such as general office work, surveying department, the agricultural department, and all the administrative heads of the plantation. [1200]

(Testimony of Stafford L. Austin.)

Q. Now, before the lands involved in these takings were taken from the plantation, do you know the number of acres in cane, or rather the number of acres of cane land?

A. Approximately 4,300 acres.

Mr. Rathbun: Just a minute. In all of what taking, may I ask?

Mr. Vituousek: Involved in the takings in this case.

Mr. Rathbun: In this case?

Mr. Vitousek: I said before the takings, the lands taken involved in these cases.

Mr. Rathbun: I don't think he means that. That wasn't 4,300 acres.

Mr. Vitousek: Yes. (Showing a document to Mr. Rathbun).

Q. By cane area or cane land, what did you refer to?

A. I mean area in which cane was planted. In other words, where we had cane actually growing.

Q. Well, you explained the system of ratoon-and planting cane. Is there any time that land might be idle?

A. Well, there may be some time when the land is idle, between the time you take the cane off for the last ratoon and the time you plant it again.

Q. You mean, then, land used by the plantation?

A. As cane land.

Q. Producing cane? A. That's right.

Q. I mean directly growing cane.

A. That's right.

(Testimony of Stafford L. Austin.)

Q. Now, in addition to the cane land, as you referred to it—

Mr. Rathbun: Just a minute. I fear that now he's gotten off the subject of physical improvements. Before we close I might renew my objection on this subject now of cane land, the same objection I made. It has no materiality whatsoever in this case.—

The Court: Same ruling.

Mr. Rathbun: —on the 13 that are now on trial, no materiality other than—

The Court: Same ruling and same exception.

Mr. Rathbun: And the same preservation of the objection?

The Court: That's right.

By Mr. Vitousek:

Q. Now, Mr. Austin, in addition to the cane lands that you mentioned, were there any other lands required in operating the Honolulu Plantation?

A. Yes, other lands such as camp sites and mill site, reservoir sites, roads, ditches and pump sites.

Q. Are those lands necessary to operate?

A. Operate a plantation.

Q. I show you, Mr. Austin, Exhibit 7, which shows the taking, as the testimony shows from the report of the Honolulu [1202] Plantation, December 31, 1944; that would show the land after the takings involved in the suits now on trial, would it not? (Showing a document in evidence to the witness.)

A. That would, about 3,309 acres of cane area.

(Testimony of Stafford L. Austin.)

Q. Now, this shows other areas, buildings and camp sites, reservoirs. (Showing another document in evidence.) Now, you have one headed "Pine, Vegetable and Pasture." What does that mean?

A. There was some area that was leased out to the pineapple growers, and there was an area that was used by the plantation employees for vegetable gardens.

Q. That's to grow household vegetables?

A. That's it, for their own use.

Q. Then roads and railroads shows how much?

A. One hundred seventy-three, approximately 173 acres.

Q. Miscellaneous and waste, generally what was the character of the acreage shown under that heading?

A. Gulches and sides of hills and places that we couldn't raise sugar cane.

Q. How about forest? A. And forest.

The Court: I think we can stop now. We have used the 10 minutes. All right, we will adjourn at this time until Monday.

Mr. Vitousek: Nine o'clock?

The Court: At nine.

(The Court adjourned at 12:30 o'clock, p.m.)

Honolulu, T. H., December 9, 1946

The Clerk: Civil No. 514, United States of America versus 257.654 acres of land, and Civil Nos. 521, 525, 527, 529, 532, 533, 535, 536, 540, 544, 548 and 684, for further trial.

The Court: As we start the second week, are the parties ready?

Mr. Vitousek: Ready, if the Court please.

The Court: All right. Mr. Martin, you are still under oath. As we adjourned you were discussing with the witness in the form of question and answer the subject of lands before and after taking.

Mr. Vitousek: Yes, if your Honor please.

STAFFORD L. AUSTIN,

a witness in behalf of the Defendants, having previously been sworn, resumed and testified further as follows:

Direct Examination  
(Continued)

By Mr. Vitousek:

Q. Mr. Austin, in connection with the lands held by the Honolulu Plantation and used by it in conducting the plantation enterprise, would you state whether or not these lands were contiguous?

A. They were. [1204]

Mr. Rathbun: Just a moment. That calls for a conclusion, if your Honor please, as to the facts.

Mr. Vitousek: I don't think that calls for a conclusion. That's a physical fact.

Mr. Rathbun: Well, it's a conclusion from the facts to tell where they are. That's how to prove it. It might be a legal question.

The Court: There is a legal question mixed up in it. I think it would be better if the answer goes out and he describes the land as such.

(Testimony of Stafford L. Austin.)

Mr. Vitousek: All right, if the Court please.

The Court: And adduce it from the facts.

By Mr. Vitousek:

Q. Mr. Austin, I show you Exhibit No. 1 introduced in this case. (Showing map in evidence to the witness) What does that exhibit show in general?

A. It shows the area comprising the Honolulu Plantation Company properties.

Q. Now, this exhibit has been the subject of other testimony. It shows the area colored in pink or red, land involved in these takings; the lines, previously taken before this suit was filed; in green, the fields of the company.

The Court: Not taken.

Mr. Vitousek: Not taken.

Q. Now, Mr. Austin, some of these lands were held as [1205] leaseholds, were they?

A. They were, yes.

Q. And in relation to the total area used by the plantation, what was the amount of land held under leasehold? Was it large or small?

A. Large. It was known as a leasehold plantation.

Q. Now, in the land shown on the map in white, in between these cane fields, will you describe in general the character of such lands commencing, say, with field 60, 61 and 62, and proceeding towards the Ewa side of the plantation?

A. Well, this is—

Q. No, fields 60, 61 and 62.

(Testimony of Stafford L. Austin.)

A. This area in here? (Indicating on map referred to.)

Q. Yes. That's 57 you're pointing to?

A. Yes, that area, 57, was a portion of fee simple land. All this is owned by the Navy, Navy lease.

Q. Navy lease? A. Yes.

Q. Leased to the Navy?

A. No, it was leased from the Navy to the Honolulu Plantation Company and subsequently taken over by the Navy for their own purpose.

Mr. Rathbun: I can't hear this at all.

The Court: I wondered if you could. You will have to speak louder. [1206]

A. Fifty-seven is about 30 acres there of Navy land that was taken back by the Navy and it was leased to the plantation at one time and the lease was cancelled.

Q. All right. Now, the area below that.

A. The area below that is plantation camp, camp areas.

Q. Camp areas?

A. Right down to the bay, the Kam highway.

Q. Between fields 48, 49, 50 and 76 and 45, 43 and 44 and 75, what is that area in white, what kind of land?

A. That's gulch land, steep slopes and a stream at the bottom.

Q. Is that fee simple or leasehold?

A. Leasehold.

Q. Held by the plantation?

A. Held by the plantation.

(Testimony of Stafford L. Austin.)

Q. And the next area in white? That's between 41, 43, 44 and 30, 31, 34.

A. That's known as the Waimalu Gulch and stream and that was held by the plantation leasehold.

Q. Now, there is some white area shown in 26 and 28. What is that area?

A. Those are gulch sides and small stream, branch stream from the Waimalu Gulch.

Q. And that is fee simple, leasehold or what?

A. Leasehold. [1207]

Q. Held by? A. Held by the plantation.

Q. Now, the area shown in green on the map, the fields. A. Plantation cane fields.

Q. And how were they held?

A. In leasehold with the exception of a few acres above the mill, which was fee simple.

Q. And the area shown in pink or red, being the areas involved in these suits, how were they held? A. Those were held in leasehold.

The Court: Just a minute on that point. Were all of the areas marked on that map in red prior to the taking totally utilized for the growing of cane?

Q. Will you answer that question?

A. They were, your Honor.

Q. Now, Mr. Austin, will you keep that Exhibit 1 before you, please. Referring you to fields 81 to 89, the pink areas—

The Court: Inclusive?

Q. —inclusive. What was the character of the land in those fields?

(Testimony of Stafford L. Austin.)

A. Well, it's level area comprising what we termed good cane land. The reason for terming it good cane land is because we usually got good output of sugar from those fields.

Q. How about the soil?

A. The soil was good cane land soil. The depth of the [1208] soil was enough to raise a good crop of cane.

Q. Will you state, its general level land?

A. Yes.

Q. How about irrigation in these fields, how was that accomplished?

A. By pump water from pump 1 in the Halawa Gulch.

Q. Was it a high or low lift?

A. Low lift pump, pumped to about a 76-foot head.

Q. Now, I refer you on the same exhibit, Exhibit 1, to fields 91 and 107. What was the character of the soil in the lands involved in these fields?

A. Very level land, and they produced good crops of cane, 91 specially good and tapering off a little at 107.

Q. And how were these fields irrigated?

A. Irrigated with water from the same pump, pump 1.

Q. High or low level?

A. Low level, low lift.

Q. Low lift?

The Court: Excuse me, when you say "low lift" you refer to the pumps' capacity?

(Testimony of Stafford L. Austin.)

Q. Will you explain, Mr. Austin, what you mean?

A. No, the elevation to which the water is pumped. A low lift pump, we say that's low lift because it only pumps 76 feet. We have pumps that we showed you on the Waimalu Gulch that pump 415 feet. And 76 compared with 415 is a low [1209] lift.

The Court: So in order to get the water to this land it only has to go up 76 feet?

The Witness: Yes.

Q. Now, Mr. Austin, going towards Ewa, still referring you to the same Exhibit 1, will you describe fields 61 and 62 and a portion of 56 colored in red on this map, as to the character of the soil?

A. This is all deep red soil and very good land for producing cane. We get good crops from all these fields and they were more or less level with a few gullies in it down by the main highway. Otherwise easy to cultivate and produce good crops.

Q. How were these fields irrigated?

A. These fields were irrigated from pump 3, from pump 3, 180-foot level.

Q. Eighty?

A. One hundred eighty foot lift. And some of the water was below the mill; the water that went through the mill was used again on the cane fields for irrigation purposes. In other words, it was—water was used in the mill and then it moved from the mill into the fields.

Q. Without pumping?

(Testimony of Stafford L. Austin.)

A. Without pumping.

Q. Without further pumping? [1210]

A. Without further pumping.

Q. At present what do you do with the water from the mill?

A. It runs to—there's only about a hundred acres that can come under that water now. The rest of it goes into the stream.

Q. Wasted? A. Wasted, yes.

Q. Proceeding further—

The Court: Excuse me. Where is part of 56?

The Witness: There. (Indicating on map.)

The Court: Oh, all right.

Q. Proceeding further Ewa, Mr. Austin, first in confining your testimony to fields 5, 4, 6 and 7, colored in red on Exhibit 1, will you describe the character of the soil?

A. Very excellent soil, deep in red color. In the red soils of Waimalu section we grew heavy cane and got good yield. That land was nearly all level in nature with a few gullies down by the main highway.

Q. How was the land, or rather how were the fields irrigated?

A. Those fields were irrigated from the water pumped, by the water pump from the Waiau station at Hawaiian Electric, and that water went through concrete ditches and was distributed to that area by these main concrete ditches. [1211]

Q. Well, what was the lift? Was there more than one lift for the irrigation of these fields?

(Testimony of Stafford L. Austin.)

A. Well, this water was not too high lift. That was first—the first reservoir, which is about 180 or 90 feet—about 104 feet there.

Q. And is there another reservoir?

A. There is a reservoir, a big reservoir right above the Waiau camp, Waiau pump.

Q. Well, how were the lands above this ditch shown on the map irrigated, that portion of the red area?      A. Oh, above that main ditch?

Q. Yes.

A. Well, there's another main line ditch coming across there that irrigated this area, and all from the same source, however.

Q. That's the main line ditch shown in green running through fields 8 and 3?

A. Yes, there was a secondary reservoir and from that reservoir the water was transmitted to the fields to that area by concrete ditch.

Q. As the indication on this Exhibit 1, this map of a ditch through fields 3 and 8, that portion of those fields shown in green, the ditch was used partly to irrigate fields?

A. The top of field 7.

Q. And what other field? [1212]

A. Four, the top of 4.

Q. Now, calling your attention to this same map, to the areas in red on fields 1—there are four different areas there under a heading "Civil No. 533." What was the character of those portions of lands?

A. There was gulch bottom and alluvial wash

(Testimony of Stafford L. Austin.)

from the gulch sides, which was very rich and produced very excellent cane.

Q. Were these fields irrigated?

A. Irrigated, yes.

Q. How were these fields irrigated?

A. Well, from the same source, but on a higher takeoff from that Waiau pipe line. And the ditch ran right straight across the plantation at a higher level. It says "reservoir" on the top of 15, across there all the way over to the gulch and from the gulch down into these fields. Field 1, the low half of field 1 was irrigated partially from the same ditch that irrigated the top of 7 and 4.

Q. Do you know whether or not there are any lands available that could be used by the plantation to grow cane other than those being now utilized?

A. There is no land excepting a small area on ridges above the present plantation irrigation system, 650-foot level.

Q. What is the character of these lands on the ridges?

A. Well, there is no water on the area and we experimented [1213] in raising cane up there, 114 acres of land planted up in that area, but finally had to give it up as being too expensive to operate, to keep going.

Q. You have described here in the course of your testimony on Friday and today various properties of the plantation, the mill, pumps, land, ditches, and so on. Were those all used in the growing of sugar cane and processing the sugar raw and refined?

(Testimony of Stafford L. Austin.)

A. They were, excepting the yeast plant that I explained. That was for the purpose of making yeast. But it used a by-product as a base, was used—

The Court: What was this yeast plant, something erected during the war?

The Witness: That was a war baby.

The Court: You don't use yeast at all in making sugar?

The Witness: No.

Q. Well, were all these properties necessary for the purpose of growing cane other than the yeast plant and the processing of the same into sugar?

A. They were, that's right.

Q. You mentioned that this plantation was called a leasehold plantation. What can you say regarding the leasing of land for the growing of cane generally throughout the Territory and particularly this island? Is it a practice?

A. Well, it's a general practice to lease land for the [1214] purpose of raising cane for production of sugar on a plantation.

Q. Are there other leasehold plantations?

A. Oh, a great number. It's the general practice throughout the Territory to lease land for raising cane.

Q. A number of leases have been introduced in the record here, most of them showing execution of the larger areas around 1936. Were you familiar with them at the time these leases were executed?

A. Yes, I am. I know about the leases and when they were executed.

(Testimony of Stafford L. Austin.)

Q. They were for lands previously held under lease in the same owners?      A. They were.

Q. Now, what was done by the plantation after securing the leases in the nature of improvements, just generally? I don't mean specifically.

A. Well, in the next three years after 1936, approximately \$1,325,000 was spent on new improvements such as ditches, camp improvements, and the like.

Q. You testified, Mr. Austin, in part that part of this mill plant was used for processing white sugar from raw sugar. Did the plantation purchase raws for the purpose of making white sugar?

A. It was necessary for the plantation to purchase raws for processing through the refinery in order to keep up with [1215] the demand for refined sugar in the Territory.

Q. Before the war emergency did the plantation purchase raw sugar to make white sugar?

A. In the Waimanalo Sugar Company and for a short time from Kaeleku Sugar Company.

Q. Where is that located?

A. Hana, Maui.

Q. Is that in business now or out of business?

A. No, that's defunct.

Q. Used for a dude ranch?      A. Yes.

Q. Now, Mr. Austin, during the war emergency were raws made available from other sources?

A. They were made available from California and Hawaiian.

Q. Why?

A. Due to the need for a substantial increase

(Testimony of Stafford L. Austin.)

in the amount of refined for the purpose of taking care of the military forces in this area and to the south.

Q. The Navy also?           A. Navy, yes.

The Court: Made available by California and Hawaiian?

Mr. Vitousek: Yes, I'm going to have that explained, if the Court please.

Q. What is the California and Hawaiian as you called it?

A. The California, C. & H. as it is shortly known, is [1216] a refinery owned by a number of plantations operating in the Hawaiian Islands. The raw sugars are contracted to C. & H. and shipped from here to C. & H. where it is refined for the general market on the mainland.

Q. Where is the mainland refinery?

A. At Crockett, California.

Q. California. Now, without the war emergency, the war emergency being over, are there any available places to purchase raw sugar in the Territory for use in Aiea?

The Court: Excuse me, I didn't get that.

(The reporter read the last question.)

A. The only available place now is Waimanalo, Waimanalo Sugar Company.

Q. Is there a sufficient quantity? What is the quantity available from the Waimanalo?

A. About 4,000 tons now.

Q. Coming back, Mr. Austin, to the plantation mill which you described Friday, used to make

(Testimony of Stafford L. Austin.)

raws out of sugar cane and also white sugar, what was the mill constructed output, that is, what was the tonnage that could be manufactured by that mill as constructed originally?

A. You mean from the cane?

Q. From cane. A. From cane?

Q. Yes. [1217]

A. A little over 30,000 tons, from 30 to 35 thousand tons.

Q. And what amount of tonnage of white sugar can be manufactured by that mill as originally constructed? A. In excess of the 30.

Q. The total including the 30?

A. Oh, including the 30, 40 to 45 thousand tons.

The Court: Let's go back over that. I don't get that.

By Mr. Vitousek:

Q. Mr. Austin, we were out and viewed this mill the other day and you described the mill. It had two operations, did it not, one manufacturing raw sugar? A. That's right.

Q. And also manufacturing white sugar?

A. That's right.

Q. Now, the raw sugar was manufactured from putting cane in, start washing it, and so forth, and taking it through the mill ending up in raw sugar. Now, what was the capacity of the mill as originally constructed to make raw sugar from cane, from sugar cane?

A. Thirty to thirty-five thousand tons.

Q. Then you described it, the raws were re-

(Testimony of Stafford L. Austin.)

melted and put through another process, made into white sugar?      A. That's right.

Q. Now, the making of the white sugar from raws—what [1218] was the capacity of the white sugar in part of the plant to make white sugar from raws?

A. Forty to forty-five thousand tons. That's the original layout as we had it.

Q. And you were able to take raws from other plantations, put them into the process, and make white sugar from those raws?

A. They are what we call outside raws, purchase of outside raws.

Q. And that's what you described the sugar bins the other day, they were sugar bins used for that purpose?      A. That's right.

Q. Now,—

The Court: Excuse me, I'm going to ask a question. This raw sugar that you buy from Waimanalo, you showed us some the other day when we were out inspecting the mill and seeing the land; it was a sort of a liquid, as I recall it, and I am wondering how you get it from Waimanalo to the mill in that form.

The Witness: We bring it from Maimanalo in bags.

The Court: Oh, it's dry at that time?

The Witness: Then it's dumped into that sugar bin that we didn't go back and look at the other side of the mill.

The Court: Would this be correct: does it come to you as a sort of brown raw sugar? [1219]

(Testimony of Stafford L. Austin.)

The Witness: It comes to us as raw sugar, but with a low polarization. Then we have to put it through the process again, through the centrifugals, to bring the polarization up so that when we put it through the filters, so we have a more pure sugar than we had originally from Waimanalo.

The Court: All right.

The Witness: We wash out some of the impurities.

The Court: That satisfies me. I was wondering how you get it in liquid form from one plantation to another.

The Witness: We take that raw sugar, then we put it in the mingler and we mix it with a little more molasses to bring it back into the same state as you saw that sugar that we put, that we had in the pans.

The Court: Thank you.

By Mr. Vitousek:

Q. Mr. Austin, previous to the takings involved in this suit, the Government took land used by the Honolulu Plantation Company, is that right?

A. Correct.

Q. Now, what I want to find out from you is, before the takings involved in this suit, other lands taken involved in this suit, what amount of raws could be made from cane on lands controlled by the Honolulu Plantation Company, sugar cane.

A. Between 20 and 21 thousand tons. [1220]

Q. Getting back to the refining end, is there any other refinery? You called the making of raws into whites refining, did you not?

(Testimony of Stafford L. Austin.)

A. Yes.

Q. Is there any other refining in the Territory?

A. There is one other refinery and that's at Maui Agricultural Company.

Q. Does that make any amount?

A. They make about 7,500 tons of sugar a year. That was their best year. I'm not quite sure of that figure but I think that was their best output.

Q. Now, Mr. Austin, you testified that the only raws available were from the Waimanalo Plantation in the island, is that right?      A. Correct.

Q. Is there any sugar cane available for purchase in the Territory for use in the mill?

A. Not on this island. There is no free sugar cane that can be bought on the open market.

Q. Well, would it be practical to buy it on the other islands and bring it here?      A. No.

Q. For use in the Honolulu Plantation mill?

A. No.

Q. Now, Mr. Austin, coming back to the mill itself, [1221] after the takings of the lands involved in these suits only, that is, the area that is shown on Exhibit 1 in red, how much sugar, raw sugar, could be made by the use of this mill you described from cane produced on lands owned and controlled by the Honolulu Plantation Company?

A. About 15,000 tons.

The Court: Wait a minute. How does that differ from the previous question to which he answered 20 to 21 thousand?

Mr. Vitousek: That was before the takings. This is in this suit after the takings.

(Testimony of Stafford L. Austin.)

The Court: On these after the takings?

Mr. Vitousek: After the takings. If the Court please, we have given three figures, one originally before any takings, then after the takings involved and then after the takings involved.

The Court: Let me have this last question.

(The reporter read the last question.)

The Court: Raw?

The Witness: Raw.

Q. After the takings involved in these suits, the plantation was what would be termed a 15,000-ton plantation? A. Correct.

Q. And that refers to the amount of raws that can be made from cane grown by it?

A. That's right. [1222]

Q. But the mill still remained capable of producing, manufacturing more raws? Did that have any effect on the value of the mill?

Mr. Rathbun: Just a minute. Did you finish the question?

Mr. Vitousek: I'll withdraw that question, if the Court please, and put it this way:

Q. What, if any, effect did that have on the value of the mill?

A. Well, we could have—it reduced the mill value to one, to a mill the size of one that would take 15,000 tons of sugar. If you've got a 15,000-ton sugar mill that size, it would have been ample to take care of the crop.

Q. Now, how about the irrigation system, the fact that these lands were taken, have any effect

(Testimony of Stafford L. Austin.)

on the irrigation system, as I understood you had designed to put in after the 1936 renewals?

A. Of course, in the lower area where all this land was taken we had to shut down pump 1 and the capacity of the pumps over on the other side of the plantation where they supplied water for 4, 7, 6 and 5—I might as well put it 4, 5, 6 and 7—

The Court: Fields?

The Witness: Yes, fields 4, 5, 6 and 7.

A. (Continuing): Reduced the amount of water necessary for that area. A good deal of money was spent in making [1223] concrete ditches over on that side of the plantation to carry the water to these areas. The system depreciated in value, or pumping system.

Q. If you only had available the fields now available, would you have the same size irrigation system?

A. We would not. We set out this irrigation system to take care of a full amount of land available at the time the system was designed.

Q. You mentioned field numbers, Mr. Austin, in your testimony. I refer you to exhibit 1 shown throughout here commencing with 1, rather large numbers on the areas marked in pink or in green. Are those the field numbers when you referred to field numbers, is that what you have been referring to?

A. Those are the numbers of the fields.

Mr. Rathbun: May I have that question?

(The reporter read the last question.)

(Testimony of Stafford L. Austin.)

Mr. Rathbun: I don't know what that question means.

The Court: Off the record.

(Discussion off the record.)

By Mr. Vitousek:

Q. Mr. Austin, how long has the Honolulu Plantation Company been conducting a sugar cane plantation and processing of sugar—

The Court: The question isn't— [1224]

Mr. Rathbun: If your Honor please—

The Court: —the question isn't finished and the witness starts to answer. Let's have the question.

Mr. Rathbun: Well, he apparently had the same misunderstanding I did.

The Court: Maybe.

Mr. Vitousek: If the Court please, I'll withdraw it and put the question so it will be clear.

The Court: All right.

Q. For how long has the Honolulu Plantation Company conducted a sugar cane plantation and conducted the manufacturing of sugar at Aiea?

Mr. Rathbun: Just a moment. Let there be an understanding on this, your Honor, without causing us to make repeated objections. May it be understood that we may reserve our exception to all this line of testimony with a motion to strike at the end, giving our reasons?

The Court: Beginning at this point?

Mr. Rathbun: All evidence. We have the objection twice on the same subject. Now, this is

(Testimony of Stafford L. Austin.)

getting to other subjects now. I don't want to repeat it all the time if it's not necessary. May it be understood that a motion to strike may be reserved at the end without making repeated objections all the way through?

The Court: Yes. [1225]

Mr. Rathbun: Your Honor understands that point? It's directly on the severance claim, of course, and there's nothing here yet.

The Court: I understand, and your position is preserved.

Mr. Rathbun: We'll make a detailed objection at the end on a motion to strike.

The Court: All right.

Mr. Vitousek: If the Court please, we are going to have several witnesses on that subject. In view of counsel's statement here, we'll be satisfied if he reserved that right to all of these witnesses.

Mr. Rathbun: Well, let's handle one at a time first.

Mr. Vitousek: All right, it's up to you.

The Court: Do you have the question in mind?

The Witness: I have.

The Court: Answer it.

A. The plantation was incorporated in 1899 and they started producing some sugar in 1900 and have been in operation since that time.

Q. That's a California corporation?

A. It's in California.

Q. Prior to the takings involved in these proceedings, would you state in general terms whether or not the plantation has been successful?

(Testimony of Stafford L. Austin.)

Mr. Rathbun: I object to that as calling for a conclusion [1226] and a multitude of things.

The Court: Successful is a broad term. I suppose you mean financially.

Mr. Vitousek: If the Court please, I'll withdraw that question and make it more specific.

The Court: All right.

Q. Prior to the takings involved in these proceedings, Mr. Austin, could you state, would you state please whether or not the plantation has provided a return on the capital investment?

Mr. Rathbun: I object to that for the same reason. That's a controversial subject.

Mr. Vitousek: That, if the Court please,—

Mr. Rathbun: If we have an audit here, it will show something.

Mr. Vitousek: I might as well refer to cases which state that that has a bearing on value, not coming to the point of capitalizing profits, but the question of whether or not it has been successful from a financial standpoint and paid a fair return and has a bearing on value. That's the purpose of this question. It's not to capitalize profits at all.

Mr. Rathbun: That depends on so many things. One of the principal things would be their method of keeping books. Now, if you are going into that question and let a conclusion like [1227] that be gone into here, it might require an audit to see by what system they have been successful. There are all kinds of ways of keeping books, specially in this Territory.

(Testimony of Stafford L. Austin.)

Mr. Vitousek: That's the privilege of the Government to do that.

Mr. Rathbun: We don't have to do it. I say you are asking for a conclusion.

Mr. Vitousek: No, I am not asking for a conclusion.

The Court: Without going into detail, the witness can answer in a general way whether or not the plantation has been a successful enterprise.

Mr. Vitousek: That's what we are asking.

The Court: And you may have an exception, as you already have, to this line.

Mr. Rathbun: Beg pardon?

The Court: I say you may have an exception, as you have already, to this line.

A. It is my belief that the stockholders of the Honolulu Plantation Company have earned a fair return on their investment.

Mr. Rathbun: Now, I move that the answer be stricken on the same grounds, if your Honor please.

The Court: Same ruling, same exception.

Mr. Rathbun: The question wasn't responsive also.

Mr. Vitousek: I think it was responsive, if the Court [1228] please.

The Court: Proceed.

By Mr. Vitousek:

Q. Can you state, Mr. Austin, whether or not in peace times, normal times, it would be possible to successfully operate a plantation where it is a 15,000-ton plantation at Aiea?

A. At the location and with the lands left avail-

(Testimony of Stafford L. Austin.)

able, it would be—and the very heavy equipment that they have there for a larger output, it wouldn't be successful, and sooner or later the plantation would have had to be sold.

Q. Did the conditions prevailing during the war make a change in the operation of the plantation?

A. The heavy demand for refined sugar and the amount of raws that was necessary to put through the mill, through the refinery, to keep abreast of those demands, was enough to make the operation a successful one.

Q. Did those conditions cease on the termination of the war?           A. They have.

Mr. Vitousek: Does the Court desire a recess?

The Court: Yes, we might just as well maintain our schedule. We will take a short recess.

(A short recess was taken at 10:03 a.m.)

After Recess

The Court: On the record.

By Mr. Vitousek:

Q. Mr. Austin, in the year 1944 or any period shortly prior to that time, within two or three years, do you know of any plantations the size of the Honolulu Plantation Company being sold in the Territory?           A. No, I don't.

The Court: Louder.

A. I don't.

Q. Can you state whether or not there was a market for a sugar plantation such as that of the Honolulu Plantation Company during that year, 1944, or shortly prior?

(Testimony of Stafford L. Austin.)

A. My opinion is that there was no market for the sale of a plantation such as that.

Q. Now, Mr. Austin, what was the fair value as of June 21, 1944, but before any of the areas were taken that are involved only in this suit of all of the property of the Honolulu Plantation Company that formed a sugar plantation enterprise conducted by it on the Island of Oahu at Aiea near Pearl Harbor, excluding all movable personal property and excluding growing crops. A. I'd say—

Mr. Rathbun: Just a minute, please. May I have just a moment to make some notes? [1230]

The Court: Yes, and will the reporter read the question.

(The reporter read the last question.)

Mr. Rathbun: We object to that, in addition to the objection already made, if your Honor please, on the ground that Mr. Austin has shown no qualifications to answer such an enlarged question of value; the second reason is that the date that they are using, June 21, 1944, is the date of one case. They were taken at different times.

The Court: Let me get that again.

Mr. Rathbun: In these takings, they were at different times, not on one date. The ones involved in this case.

The Court: Well, this question relates to before the takings.

Mr. Rathbun: That's the trouble. He named the date, June 21, 1944. In other words, if there is anything to their theory, it took place after each take, and they vary. Not only that but there were

(Testimony of Stafford L. Austin.)

rights of entry way previous to that; one case, for instance, 527, possession was taken in March of '42 by the military governor's order, which your Honor can take judicial notice of.

The Court: Not if it's by a military governor.

Mr. Rathbun: Why not? The use of possession for the purpose of these cases.

The Court: Well, that's something we'll cross later.

Mr. Rathbun: Well, I'm making it now. [1231]

The Court: Well, I want to see it. You mean the military governor gave a right of entry to the United States?

Mr. Rathbun: They refused to give possession.

The Court: What was the matter with the Government coming to the Court? The Court was open.

Mr. Rathbun: They took this way of doing it. That's all. The right of possession of another branch of the Government.

The Court: At the moment it doesn't, for technical reasons, appeal to me.

Mr. Rathbun: Very well. The question covers such a field of possibilities and facts and assumed facts, etc., that without going into details and knowing what he based it on, that it's objectionable for that reason. That's all.

Mr. Vitousek: Well, if the Court please, this question is the question in the first place on the points made, that is, prior to the filing of the first suit and prior to the takings, which is, we take it, that it assumes the takings were made at the time

(Testimony of Stafford L. Austin.)

of the suit. There is no evidence in this record so far that the lands were taken prior to that time. I assume the Government in this case will put evidence in, and at that time we will cross that bridge, as to the legal effect of it or not, that the suits were filed, the first one was filed June 21, 1944, the first one involved in these suits, combination of suits. And they were filed [1232] thereafter over a period of approximately six months.

Now, the order of consolidation says that they be tried as if they were one taking, and we are taking the first suit. Now, if it should be different, we will put on evidence as to there being any difference over this 6-months' period. But we are entitled to ask this question on our theory of the case. That's one point.

The record shows in this case that settlement has been made and a judgment entered for growing crops, a damage to growing crops taken on these fields. So we have to exclude that.

The Court: In all 13 cases?

Mr. Vitousek: No, not in all 13, but in those where damage was involved. We are not claiming damage in all of them for growing crops. The actual growing crop damage was settled; an order, judgment, was entered, and payment made. So we are excluding that. Then, under the theory of cases that we have previously cited as to this case, Baetjer and one other, in fact, all the cases along these line of damage, severance damage, you must exclude personal property because that is not a subject of

(Testimony of Stafford L. Austin.)

damage in condemnation cases. So we are excluding the movable personal property and confining it to this question as it is framed, as confined to the property described, used by the plantation, either land or the buildings and heavy equipment such as the witness has [1223] described to the Court as forming the mill, the camps, the pumps, the irrigation system, and so on.

The Court: Do you include in this question the fee parcels?

**Mr. Vitousek:** The answer will include everything for which we claim damages in this action. As I explained at the beginning of the case, there are two theories, one relating simply to specific damages, in the event there is no severance damage allowed; if there is any question of value before and after the taking, it must include everything.

The Court: What I am getting at is that in terms of the objection that this witness is not qualified to express an opinion as to value, we have had one person testify for the owner as to the value of the fee.

**Mr. Vitousek:** Yes.

The Court: And we can't have a series of people coming here for the owner and giving their opinion.

**Mr. Vitousek:** If the Court please, this witness, as we have shown in the beginning, has the power of attorney from the owner. This is not on the phase that the other witness testified in regard to or which was on the question of specific damage.

(Testimony of Stafford L. Austin.)

This is on the phase of the value before and after the taking of all these properties. It is an entirely different question from the one that was presented to the first witness that your Honor refers to, which related only to four [1234] kuleanas.

The Court: Well, the only theory on which he could on this particular point express an opinion would be for and on behalf of the owner, not as an expert.

Mr. Vitousek: We haven't qualified Mr. Austin as an expert. We have made no attempt to.

The Court: Do you have anything to say as a reply?

Mr. Rathbun: No, your Honor.

The Court: I am going to overrule the objection, and you may have an exception. Now, will you read the question?

(The reporter read the last question.)

A. I would say about four million three hundred thousand.

Mr. Rathbun: Just a moment. All right.

The Court: You may answer now.

A. About four million three hundred thousand dollars.

Q. Mr. Austin, what was the fair value of all of the properties of the Honolulu Plantation Company that formed a sugar plantation enterprise conducted by it on the Island of Oahu at Aiea, near Pearl Harbor, excluding all movable personal property and excluding growing crops and after the takings involved in this consolidated action?

(Testimony of Stafford L. Austin.)

Mr. Rathbun: Now, I object to that upon the same grounds, and further possible grounds, if your Honor please, that it doesn't appear that he is giving his opinion based upon the conditions and terms of the leases covering these properties, [1235] which are in evidence.

Mr. Vitousek: If the Court please, that last question, as the Court will recall this morning Mr. Austin said he knew about the leases, the extension and their terms.

The Court: I am going to overrule the objection. You may have an exception. Do you have the question in mind? It's the same question, only after these takings.

A. About three million three hundred thousand.

Q. Mr. Austin, in that question I asked you to exclude the movable personal property. You did not consider such? A. No.

Q. What in general is the character of that property which you have excluded?

A. The automobiles, cane loaders, trucks, moving railroad equipment, and such things as that, such equipment as that.

Q. As rolling stock of the railroad?

A. Of the railroad.

Q. How about equipment in the buildings like hospital equipment?

A. That also can be personal.

Q. Live stock?

A. Live stock, office equipment.

Q. Office? A. Office equipment. [1236]

(Testimony of Stafford L. Austin.)

Q. Does that come, without giving the figure, to any considerable sum on the books of the company? A. I beg pardon?

Q. Did that amount to any considerable sum, without giving the figure? A. That does.

The Court: Just a minute, meaning the office equipment alone?

Mr. Rathbun: I object to that.

Mr. Vitousek: The whole included.

Mr. Rathbun: I object to that as incompetent, irrelevant and immaterial and it calls for a conclusion.

The Court: Well, if we are not considering it, why particularly bother with it?

Mr. Vitousek: Well, if the Court please, this is a particular inclusion and it may become important later in relation to sales. We are not giving the exact figure, but it can be arrived at later, so it will be necessary.

The Court: Well, I can't at the moment see the particular materiality of it but I will allow the answer. You may have an exception.

A. Quite a sum.

Mr. Rathbun: I move that that be stricken as meaning nothing.

The Court: It may go out. [1237]

Mr. Vitousek: May I have the question?

(The reporter read the last question.)

The Court: The answer was "quite a sum."

Mr. Vitousek: I think that was in response to the question.

(Testimony of Stafford L. Austin.)

The Court: It does remain in, but the phrase "quite a sum" may go out.

Mr. Vitousek: Yes.

Q. One other question in connection with that, Mr. Austin. You gave a somewhat detailed list of the personal property excluded. That included current assets such as cash? A. It does.

Q. That is in the exclusion made in my question to you, and you giving the value excluded cash and current assets? A. Correct.

Q. Now, in regard to growing crops, Mr. Austin, growing crops on the fields during the dates for which you gave your total value, you excluded growing crops? A. Excluded growing crops.

Q. I ask you the same question in regard to growing crops, that the value of those crops would be large or small? A. Large.

Q. And those were excluded in your consideration? A. Excluded. [1238]

Mr. Driver: They have already been paid for them.

Mr. Rathbun: No materiality to that. I move that that be stricken.

The Court: Well, I couldn't see much materiality in the other one and I left it in, so I will leave this one in, too, for what it's worth. If it is not connected up some time later, you may move to strike it.

Mr. Vitousek: If the Court please, those are all the questions of Mr. Austin on direct.

The Court: You may cross-examine.

(Testimony of Stafford L. Austin.)

**Cross-Examination**

By Mr. Rathbun:

Q. Mr. Austin, you stated in your direct examination the other day that before the takes Honolulu Plantation had 4,300 acres with cane land, cane actually planted, is that right?

A. Available cane land.

Q. Available cane land. You mean planted with cane?

A. Well, some of the area wasn't all planted with cane. It might have been fallow at the time.

Q. Well, was all of the cane land upon which you could have planted cane being used for the growing of cane? A. It was.

Q. And on June 21, 1944? A. It was.

Q. Then 4,300 acres of land which you testified to didn't included in it only growing cane land?

A. I don't know what you are talking about on that one.

Q. What don't you know?

A. You said "only."

Q. Forty-three hundred that you testified to, was that all growing cane land?

A. That was the land on which you could grow cane.

Q. Well, how much was actually growing cane on it, that you were actually growing cane on?

A. The 4,300 acres.

Q. Well, that's what I asked you. All of it?

A. Well, no, some of it was in fallow. You

(Testimony of Stafford L. Austin.)

mean, you want to ask me how much cane was on the ground, in the ground?

Q. I want to ask you what you were using to grow cane on. A. The 4,300 acres.

Q. Actually grew cane on that 4,300 acres immediately preceding June 21, 1944?

A. Excepting where there was a field in fallow.

Q. What do you mean by "fallow?"

A. Well, it might have been in the process of being planted.

Q. Well, of course.

A. That's what I mean. [1240]

Q. I'm talking about cane, if you are going to exclude any that had never been used for cane. Was there any such included in that?

A. No, no.

Mr. Rathbun: If your Honor please, I think I should make a motion at this time to strike all of his testimony before we start any examination.

The Court: All right.

Mr. Rathbun: In addition to the reasons already given, and to be more specific at this time, we object to his testimony and I move to strike it on all, insofar as it applies to anything other than the land taken in the 13 cases involved in this trial, for the reason that the testimony is irrelevant and immaterial, attempts to lay the background for a claim which so far is unascertainable under the pleadings in the case; that it is improper to admit such testimony on the theory that it tends to establish or lay the foundation for a claim for alleged

(Testimony of Stafford L. Austin.)

severance damages without limiting the testimony to the leases offered in evidence, and without consideration of the legal effect of such leases upon the offer of the testimony of Mr. Austin. It is improper to permit a detailed description of all of the property of the defendant when only a small portion is involved in the 13 cases consolidated for trial, particularly so when such testimony is received without regard to the legal situation created by the [1241] leases and the effect of the condemnation proceedings on such leases. Further, it is improper to receive such testimony because in the leases containing condemnation clauses, the sum of which contained condemnation clauses, it is the Government's contention that upon the institution of said condemnation proceedings these leases were at an end, and hence the testimony is not material but on the contrary tends to confuse the issues. Further than that, specifically on the particular leases covering the Damon land, among these 13 cases, really raises a question of law that those leases have expired and never have been renewed and only had a very short time to run, a few months on their face.

Mr. Vitousek: If the Court please, this calls for quite an extended argument. If the Government is going to press it, it should give all the reasons. Otherwise, we have argued some of this and others we haven't.

The Court: This would go to the whole case. I'd like to have it full argued by both of you at

(Testimony of Stafford L. Austin.)

the end because it gets right to the merits of the entire matter before the Court. So at this time, with the right to renew it and argue it later, but for the purposes of giving you protection at the moment, I will deny your motion to strike and give you an exception with the understanding that I want this whole matter argued fully when all the evidence is in.

By Mr. Rathbun:

Q. Now, you said, Mr. Austin, among other things that [1242] the general practice in this Territory in connection with sugar plantations was to lease land. You meant by that lease it rather than buy it in fee? A. Was to lease land, yes.

Q. Rather than to buy it?

A. They couldn't buy it; most of the land was in lease, had to be leased in order to operate it.

Q. That's why I asked you the question. That wasn't because of any practice in the sugar plantation business, but was rather because of the close holdings of the lands by big estates that would not sell them in fee. Isn't that the answer?

A. Well, that was the reason why they were leased.

Q. Yes. That's what I mean.

A. If you wanted a sugar plantation you'd have to go out and lease the land.

Q. You used the words "it's the practice." There isn't anything peculiar about any practice except that you couldn't buy any fee land.

A. It's the practice on this island because practically every one of the plantations is leasehold.

(Testimony of Stafford L. Austin.)

Q. Well, they do so because they have to; they can't buy it in fee?

A. I imagine that's the reason.

Q. Well, you know that's the reason, don't you?

A. I imagine, sure, I think so. I don't believe you can go out and buy the land.

Q. Now, you said that this mill could manufacture originally 13,000 to 35,000 tons of raw sugar, is that correct?

The Court: Thirty to thirty-five.

Mr. Rathbun: Thirty to thirty-five.

A. Thirty to thirty-five.

Mr. Vitousek: You said thirteen.

Mr. Rathbun: I'm sorry.

Q. Now, what time did you have in mind when you fixed those figures? A. What time?

Q. Yes.

A. That was before the, before any of the takings.

Q. Back how far in years?

A. Well, in 1932 or 3, we put through 34,000 tons, somewheres around there. I couldn't tell you exactly now.

Q. Well, is that when it was, 1932 or '33?

A. It was—no, 1928 we put through 34,653 tons of sugar.

Q. All right, then, it was in 1928, is that right?

A. Yes.

Q. Is that the first time that you had reached that capacity?

A. That's the first time we reached that capacity.

(Testimony of Stafford L. Austin.)

Q. And that capacity continued up to when?

A. We had in 19—that's for one year we put through 34,653 tons.

Q. All right. Then what is the next tonnage, the next year, if you've got it by years?

A. Yes, 1929 was 31,912.

Q. What was it in '30? A. 31,475.

Q. What was it in '31? A. 29,691.

Q. Thirty-two? A. 31,046.

Q. Thirty-three? A. 30,008.

Q. Thirty-four? A. It was 23,168.

Q. Thirty-five? A. 26,357.

The Court: Once again? Just a minute.

A. 26,357; 27,296.

Mr. Vitousek: Twenty-seven or thirty-seven?

The Witness: 1936 was 27,640—296.

Q. What was it in '37? A. 27,296.

Q. What was it in '38? A. 27,640. [1245]

Q. And '39? A. 26,238.

Q. '40? A. 24,712.

Q. '41? A. 24,226.

Q. '42? A. 16,191.

Q. '43? A. 20,525.

Q. What was that? A. 20,525.

Q. Twenty? A. 20,525, tons.

Q. And the next year?

A. I haven't got that here.

Q. You only go to the year what?

A. 1943.

Q. Does that include the year 1943, the last figure you gave?

(Testimony of Stafford L. Austin.)

A. Yes, that was the last figure I gave, 20,557, I think.

Q. Were those figures that you have now given working the mill to capacity through those years?

A. When we get up to 34,500 tons we were getting the peak. [1246]

Q. But under that you didn't hit your capacity, is that it, in other years I mean?

A. Well, we did for the season.

Q. What do you mean "for the season?"

A. Well, I mean the season runs for ten months and we had 24-hour service, 24 hours around the clock, 6 days a week, running as rapidly as we could. Now, we had a leeway of another month, and if we put a little more pressure on it, why we could get up to 35,000 tons. In other words, that was the peak, between 30 and 35 thousand tons was the peak load for the mill.

Q. But you didn't get it in those years that you have given? A. No, not the peak.

Q. Now, there were some previous lands taken, weren't there, before the cases involved here, the 13 cases, by the United States Government?

A. Yes, correct.

Q. Cane land? A. Cane land, yes.

Q. When was Hickam Field taken?

A. Hickam Field is 1935, I think it was, yes.

Q. And how many acres were involved at that time?

A. About 600, somewheres around there, 600. I'll look it up for you if you like. I don't know whether that's the exact figure. [1247]

(Testimony of Stafford L. Austin.)

Q. Well, that's approximately 600, 600 odd, according to my understanding. You have given a value of \$3,300,000 after the takings in these 13 cases. Is that what you meant?

A. That's what I meant, yes.

Q. What's the value of that property, of the property of the Honolulu Plantation Company, with the exclusion that you gave here, immediately previous to the Hickam Field taking?

A. About a little over \$5,000,000.

Q. So that according to your theory the 600 acres brought the value down—strike that. What was it after the taking?

Mr. Vitousek: What taking are you referring to?

Mr. Rathbun: Hickam Field.

Mr. Vitousek: There were two Hickam Field takings.

Mr. Rathbun: He knows the one, 600 acres.

A. Between that and—I would say it was about five million.

Q. Five million, still worth five million after they took the 600 acres?

A. No, I said it was worth over that when they took Hickam Field. It was worth between five and six million.

Q. Oh, you want to change that now?

A. That's O.K. with me.

Q. Well, you are testifying.

A. About five million five hundred. [1248]

Q. About five million five hundred now? Is

(Testimony of Stafford L. Austin.)

that your final figure, immediately preceding the taking of Hickam Field?      A. I would say that.

Q. Then it was worth five million after they took the 600 acres of Hickam Field?

A. Yes, close to that.

Q. So that 600 acres were all in production of cane, were they?

A. They were all in production of cane.

Q. Went through this same mill that you have testified about?      A. Same mill.

Q. And the 600 acres brought it down \$500,000, is that it?

A. Oh, I'd say somewheres around there, between five and six hundred thousand dollars.

Q. Now, after that Hickam Field take, up to the time of the taking in these 13 cases, after the Hickam Field take and up to the time of the first of the takings in these 13 cases, how many acres of cane were taken by the Government that were being used for the growing of sugar?

A. Oh, between eight hundred and a thousand.

Q. What's that?

A. Not quite sure on that but I think it's between eight hundred and a thousand. [1249]

Q. Then when they took the first take of those—what cases were those, do you know? What cases were those involved in, do you know?

A. I haven't got the numbers of those cases.

Q. Is Makalapa crater on it?

A. Yes, Makalapa crater.

Q. It was Civil 416, wasn't it?

(Testimony of Stafford L. Austin.)

A. That I don't know. I haven't got the numbers.

The Court: Mr. Rathbun, do you want him to look at the same type of map you are looking at?

Mr. Rathbun: Yes, your Honor.

The Court: Exhibit 8. The numbers of the cases are marked on that map. (Handing map in evidence to the witness)

By Mr. Rathbun:

Q. Do you see a number on there, 416, Mr. Austin, right at the beginning of the Aiea waterfront?

A. Yes, 416, I see that.

Q. That's one of the takes that took place after Hickam Field? A. That's right.

Q. How many acres are involved in 416?

A. I wouldn't know until I look it up. I'll have to look it up.

Q. Could you estimate it?

A. I think it was some 80 odd acres. [1250]

Q. Can't you take your cane map, and the fields, and tell? A. I can't tell by looking at it.

Q. Why not?

A. It doesn't give the area up there.

Q. It goes to Makalapa?

A. Makalapa crater. I would say on an offhand basis, I would say about 87 acres in that area. I'm not sure.

Q. All right, that's close enough.

A. I'll have to look up the records.

Q. Now, what other cases, using that map, the one that you have in your hands?

A. Well, it includes—

(Testimony of Stafford L. Austin.)

Q. What other cases did they take of land after the Hickam Field takes? A. —field 81, 97, 98.

Q. Now, if you are going to talk about fields—

A. I talk about fields better than I do—

Q. I know, but I can talk about others better. But that doesn't help me any.

The Court: Suppose you put both of your knowledge together.

Q. Point out where the next is that you had in mind? A. That's the—

Q. That's the case we have been talking about, the Makalapa crater, is it not? [1251]

The Court: Civil 416.

Mr. Vitousek: I don't get the question.

Mr. Rathbun: The question has gone by long ago.

Mr. Vitousek: Well, I think the two ought to be tied up.

The Court: Just a minute. The witness has said that after the Hickam takes and before these takings there were in his opinion about eight hundred to a thousand acres taken by the Government. Now, Mr. Rathbun is trying to break that down into cases, and he mentioned first that there was involved as part of that eight hundred to a thousand acres Civil 416, Makalapa crater, roughly 87 acres. Right?

The Witness: Yes, the crater is 87, but there's some more down here.

Q. Yes. That's 416, now isn't it? Have you got fields on this map, Exhibit 1? You've got fields 72, 80 and 81 shown? A. Yes.

(Testimony of Stafford L. Austin.)

Q. Now, there were some more taken in that case towards the harbor, wasn't there?

Mr. Vitousek: I object to these questions. It seems as if Mr. Rathbun is testifying. Mr. Austin says he can't tell the exact areas involved unless he looks it up. And now the attorney is pointing out, saying some of these were taken, now, weren't there more taken towards the harbor. I think there ought to be a question and answer.

Mr. Rathbun: Well, I tried to make a question. If you [1252] are objecting to my leading, I have a right to leading on cross-examination.

Mr. Vitousek: I don't object to your leading. I object to your testifying. Now, you said in these there were some takings and wasn't there more towards the harbor. What I am objecting to is that statement.

Mr. Rathbun: I have a right on cross.

The Court: You have a right to ask questions and not to make a statement and then add to that.

Mr. Rathbun: I submit I made a statement to that.

The Court: All right. May we have the last question?

(The reporter read the last question.)

By Mr. Rathbun:

Q. In addition to fields 72, 80 and 81 shown on Exhibit 1 in this case, weren't there more lands taken in 416, Civil 416 in this Court, those lands being in the direction towards the harbor?

(Testimony of Stafford L. Austin.)

Mr. Vitousek: Now, if the Court please,—

Mr. Rathbun: Immediately adjoining these fields.

Mr. Vitousek: —what I object to is the statement by counsel. There is nothing on Exhibit 1 showing that those fields were in 416.

Mr. Rathbun: That's why I'm asking.

Mr. Vitousek: Well, ask it. I object to counsel saying they were in 416 and then proceeding to ask a question on that [1253] assumption until it has been shown or some question asked. It's misleading. It's an improper question because it contains a statement that these fields were in that which I don't know, and the map does not show it.

Mr. Rathbun: Your client has said so, or your witness has, rather.

Mr. Vitousek: I haven't heard him saying so. He had been talking about Makalapa crater. Why don't you ask him?

Mr. Rathbun: Well, I did ask him.

The Court: Just a minute. I don't think the question is out of order as last stated. Let me ask whether or not another map would be more useful?

The Witness: Well, if I knew. I can't tie up the fields with this map. I know 72, 80 and 81 were in that case. Now, whether there was a little bit more on the right or left, I'm not sure. I think there was. I think there was. That was not in cane land. It was some other.

The Court: Was not?

The Witness: Was not.

(Testimony of Stafford L. Austin.)

Q. Now, what other cases were there in addition to 416 after the Hickam Field takes in which lands of the Honolulu Plantation Company were taken?

A. Well, there was the field at the hospital, field 77 was taken here.

Q. Field 77? [1254]                      A. About 67 acres.

Q. That was be suit No. 535?                      A. 535.

Q. Yes? There's a series of takes, 452—

Mr. Vitousek: I think that ought to be shown in the record, that the number should be 452.

Mr. Rathbun: Now, let that show in the record. For God's sake.

Mr. Vitousek: Now, this was introduced in evidence and it was shown in evidence and it was shown it was not accurate, and it was simply produced to show the general locality. And I think that the Court will recall when that was put in evidence that No. 1 does not show the exact areas, the exact location.

The Court: Well, there is nothing before me to rule on. I think it might be advisable for us to take a recess at this time and see if we can start afresh without all this unnecessary argument.

Mr. Rathbun: May I have a ruling of the Court warning the witness not to talk to anyone during intermission, to counsel or anybody else?

Mr. Vitousek: What is the ruling?

The Court: There is none. He is asking for a ruling that during the recess the witness not be allowed to talk to anyone. It's a little bit unusual.

(Testimony of Stafford L. Austin.)

Mr. Rathbun: Many, many times it's been done in court.

Mr. Vitousek: It's my practice not to talk to a witness—whenever he is not on cross-examination, but afterwards we have the privilege.

The Court: The witness is on cross-examination. I don't think there is any ruling necessary.

Mr. Rathbun: Exception.

(A short recess was taken at 11:07 a.m.)

### After Recess

By Mr. Rathbun:

Q. Now, Mr. Austin, let's start all over again. In addition to Makalapa crater, other lands were taken by the Government being used to raise sugar cane for Honolulu Plantation, were there not?

A. There were.

Q. What is the next take that you know about?

A. After the Hickam Field taking?

Q. After the Makalapa.

A. Oh, Makalapa.

Q. Can you give the numbers of acres, about?

A. Oh, I can't be sure.

Q. Well, can you estimate it?

A. Yes, it was, I imagine about 150, 160 acres.

Q. All right. What is the next take that you know about? [1256]

A. Next take was—maybe, I may be wrong in the sequence. It's been such a long time ago, but I think the next take was up there in Red Hill.

Q. Yes, Civil 452 that would be. How many

(Testimony of Stafford L. Austin.)

acres were in that taken and when was it about?

A. 1940, I think.

Q. How many acres in that take? About?

A. Oh, there was over a hundred acres.

The Court: Just a minute. When he said, or somebody said, Civil 452, someone else said Red Hill.

The Witness: Red Hill, yes.

The Court: 452 is where the Naval hospital is located, isn't it?

Mr. Rathbun: Up here. (Indicating on map)

The Clerk: 522 is the Naval hospital.

Mr. Rathbun: 452, here. (Indicating on map)

The Witness: Red Hill we are talking about.

Mr. Rathbun: You are talking about this — right?

The Court: This isn't Red Hill, is it?

The Witness: No, that's the Navy hospital.

Mr. Rathbun: That's the Navy hospital.

The Witness: I'm talking about Red Hill.

Q. 442?           A. 442.

Q. Correct the 452 to 442. Now, in 442, how many acres [1257] were involved?

A. There was over a hundred acres involved in that. I don't know exactly how much. I can give you the record on all of this if you'd like it. I mean I have to get it. I haven't got it with me.

Q. I can't help that. I'm asking you what you know about it. That's all I can do. Now, what other takes were there in addition to that, previous to the 13 cases we are trying here and after Hickam Field?

(Testimony of Stafford L. Austin.)

A. There was the Navy hospital, which is 442, I think, on your map. That was about 67 acres in that field.

The Court: That's 452 at long last.

Mr. Rathbun: That's right.

A. Then we had—

Q. Wait a minute. What year was that in 452?

A. That was either '40 or '41. I'm not sure which.

Q. What other takes were there within those periods of time?

The Court: Excuse me. You didn't ask the acreage on that.

Mr. Rathbun: Sixty-seven acres.

The Court: Sixty-seven acres?

Mr. Rathbun: Is that right, Mr. Austin?

The Witness: About sixty-seven.

The Court: Now, after that, the next take was what?

The Witness: Down in Puuloa, Field 97. [1258]

Mr. Vitousek: I didn't get that field number.

A. Field 97. That's a gore lot.

Mr. Rathbun: Civil 436, I think.

The Court: Civil 436.

Q. And when was that take, Mr. Austin?

A. That was taken in 1941-2, I think, beginning of '41, I think that's when it was taken.

Q. And how many acres were in that?

A. Well, there was 97 acres. You add them up and I'll try to give them.

Q. Well, about? You are familiar with these fields, aren't you?

(Testimony of Stafford L. Austin.)

A. Sure, but I have been away from there for two and one-half years, longer than that, three years.

Q. Give an estimate of it.

A. About 253 acres in that, approximately 250 acres.

Mr. Driver: Instead of 97?

The Witness: That's 97, 96.

The Court: Field 97?

The Witness: 97, 96, 95 and a portion of 94.

Q. All right. Any others in that period of time?

A. Then there was a portion of 94, 93 and 92.

Q. Fields you are referring to?

A. Yes, fields. And that was a later date.

Q. Well, just previous to the takes in this case now I [1259] am talking about.

A. Yes. Right here. (Indicating on map in evidence)

The Court: Louder.

A. Here, this portion.

(Discussion off the record)

By Mr. Rathbun:

Q. Now, you just got through giving the gore lot as being 253 acres. A. Well, plus—

Q. Wait a minute. I'll straighten it out. Upon looking at the map which the Judge has there, which you have been referring to, showing these cases and their general location—

The Court: Exhibit 8.

Q. —Exhibit 8, do you want to change your testimony as to what was involved in Civil 436

(Testimony of Stafford L. Austin.)

now? A. Yes, because I missed—

Q. All right, give us the total, then, again.

A. You want the total in 436?

Q. That's right.

A. Three hundred fifty-two would be more like it.

Q. All right. Now, are there any other takes in between those dates?

A. There was a piece below the main highway where they had used for recreational grounds; that was about 23 acres of cane land, a portion of field 62 below the Kam highway. [1260]

Q. Shown on Exhibit 8, that would be Civil 430.

A. About 23 acres, somewheres around there. That was in cane land.

Q. What year was that?

A. That was taken in 1940 or '41, before the blitz.

Q. Any other between those dates?

A. I can't—I think that's—maybe one or two small pieces I haven't mentioned but I think that's the largest portion.

Q. And that's in round figures about 700 acres in the ones you have testified to which took place between the taking in the Hickam Field and the cases on trial here? A. That's right.

The Court: Just a minute. Will you and Mr. Vitousek come up here a moment?

(Discussion off the record)

The Court: Now, Mr. Reporter, the total?

(Testimony of Stafford L. Austin.)

(The reporter read the total mentioned in last question.)

The Witness: I was going to say that you, if you want the accurate figures on these, why we can produce them for you. I won't say that there are.

Mr. Rathbun: Well, you speak to Mr. Vitousek about that, then. I'm satisfied with what you have given.

Mr. Vitousek: Did he say he wouldn't vouch for these figures? [1261]

Mr. Rathbun: He didn't say such thing.

The Court: He offered to make accurate figures available. I should think they would be available in the Court files. Proceed.

Q. Now, at the date of the first of these last takings that you have talked about, Makalapa was the first, wasn't it? A. Makalapa, yes.

Q. Now, when they took Makalapa crater, you'd you'd say that the valuation on all of these things, with the exclusions that you have made, would be about five million dollars, is that your testimony?

A. That was my testimony.

Q. Now, how much did the first take on Makalapa crater reduce that value, the 150 to 160 acres?

A. Oh, I would say in the neighborhood of \$160,000, somewheres around there.

Q. And what did the Red Hill take of a hundred acres decrease it? A. About \$100,000.

Q. And the Navy hospital, 67 acres?

A. About sixty-seven thousand.

Q. What?

(Testimony of Stafford L. Austin.)

A. About sixty-seven thousand.

Q. And the gore lot, 352 acres?

A. About \$352,000. [1262]

Q. And the 23 acres?

A. Twenty-three, about \$23,000.

Q. You are using a thousand dollars an acre on each one of those, aren't you?

A. Correct.

Q. Why do you do that?

A. Well, it's been the, more or less the rule of thumb from the standpoint of the plantations in my experience in the plantations in talking with others, from the standpoint of the Honolulu Plantation Company, with the refinery and such, that a thousand dollars an acre was an equitable figure to use for that purpose.

Q. That's according to the books of the Honolulu Plantation Company and their method of book-keeping, is that what you mean? A. No.

Q. What do you mean, then?

A. I mean from the standpoint of taking values and from talking to others, and the amount of capital required for a plantation the size of Honolulu Plantation Company, for putting in all the various equipment necessary to run a plantation that it would come to about that figure.

Q. Well, is that valuation of the plant? Are you getting a capital value to it now in that answer? A. A capital value. [1263]

Q. Capital assets?

A. The initial investment, such as for ditches

(Testimony of Stafford L. Austin.)

and pipe lines and mill and all the equipment necessary to run a plantation.

Q. Did it reduce your capital investment when the Hickam Field take was made, according to your theory?

A. Did it reduce the capital investment?

Q. Yes, the value of it.

Mr. Vitousek: If the Court please, we object to that. There are two different questions there. First he says it reduced the capital investment and then the value of it. That is not the same question at all.

Mr. Rathbun: Same thing, in my opinion.

Mr. Vitousek: Well, if the Court please, no matter what counsel's opinion is, what you invest in an enterprise doesn't necessarily mean it is the value of any piece of property. Capital investment and value are two different things

Mr. Rathbun: I'll make it easier than that.

Q. Did anything happen to your capital investment after the Hickam Field take?

A. It shrunk the value.

Q. By how much?

A. It shrunk the value of the total investment of the value of your mill and the rest of the plantation as a whole.

Q. Well, you carry capital investment on the books, [1264] don't you?

A. Your capital investment is carried on the books, yes.

Q. Was there a change made in the capital in-

(Testimony of Stafford L. Austin.)

vestment after the Hickam Field take, on the Honolulu Plantation Company books?

A. Well, that I haven't testified.

Q. You haven't seen fit to look that up?

A. I haven't seen fit to look it up?

Q. Yes, I'm asking you.

A. Well, I'm not an expert accountant.

Q. Never mind why. Have you?

A. No, I haven't.

Q. You're still testifying here as an expert on value, aren't you?      A. No, I am not.

Q. You are not?      A. No, sir.

Q. In what capacity are you testifying?

A. I am testifying as a plantation operations man.

Q. Did you ever sell a plantation as big as this before?      A. Never sold one.

Q. Never been one sold here as big as this?

A. Not that I know of.

Q. You have nothing to go on except your opinion?      A. That's right, correct. [1265]

Q. Now, in your opinion, would the capital investment be depleted in any amount by the takes in the Hickam Field case?

A. Capital investment, it would shrink in value.

Q. By how much because of that take?

A. About \$600,000.

Q. You don't know whether the books show that or not?

A. No, I don't. I couldn't say. That's my opinion.

(Testimony of Stafford L. Austin.)

Q. Likewise, these five other takings after Hickam Field, amounting to in the neighborhood of 700 acres, did those reduce the capital investment?

A. It shrunk the value of the plantation by that much.

Q. Affected capital investment that way, did it?

A. It wouldn't affect the capital investment;—

Q. Yes?

A. —but it would shrink the value of the whole plant, as a whole.

Q. And you think it wouldn't have any effect on the capital investment?

A. Well, it would reduce the value of the plantation to the stockholders, to the owners.

Q. I heard you say that. Did it have any effect on the capital investment?

A. I couldn't tell you.

Q. Now carried on the books as capital investment? [1266]

A. I am not able to answer that one.

Q. You never saw the books in that respect of the Honolulu Plantation Company?

A. Why, I haven't, not in that one item.

Q. Then you haven't seen them, you haven't looked at them in that respect?

A. Not in that respect, no.

Q. Along the line of your testimony as to the value of the things that you testified to, with the exclusions thereon, did the amount of overhead in any way have any effect on your conclusions?

A. The amount of overhead?

(Testimony of Stafford L. Austin.)

Q. Yes. A. What do you mean?

Q. Well, did it have any effect on it in giving your value? Did you consider the overhead? Wouldn't that go into the question of the value of a plant like this?

A. It gets top-heavy if you've got too much overhead, and if it gets too small why you can't operate it efficiently if you don't have enough stuff coming in, and you have to operate a big plant to get——

Q. I know that's your point, but that isn't what I asked you. Overhead would have an effect on the value that you'd give to this property, wouldn't it, whether it was large or small? [1267]

A. It would have some effect, yes.

Q. Don't you think that a purchaser of this property would consider what the necessary operating overhead was when an offer was made for this property, if an offer was made?

A. If there was an offer made, he would.

Q. Your value, then, was that someone would make an offer, then, to the amount that you testified to? A. That's right.

Q. Was there any increase on the overhead of the books of the Honolulu Plantation Company from the year 1940 up to the date of the first taking in these 13 cases?

A. Any increase in overhead?

Q. Yes.

A. There was probably a slight increase but not because——

(Testimony of Stafford L. Austin.)

Q. How much did it increase in 1941 over 1940?

A. That I couldn't tell you.

Q. You never looked at the books to see?

A. I may have looked at the books but I didn't take that into consideration.

Q. You didn't take that into consideration at all in giving this valuation that you have given?

A. No, I didn't.

Q. Do you know what it was from 1941 to '42, increase or decrease, if any?

A. No, I don't. [1268]

Q. From '42 to '43? A. No.

Q. From '43 to '44? A. No, I don't.

Q. You don't know how it was carried on the books during those years?

A. No, I don't know exactly how it was carried on the books.

Q. But did you assist in the preparation of a claim that was filed before the Congress of the United States on behalf of the Honolulu Plantation Company? A. I did.

Q. Did you look at the exhibits that were attached to that claim?

A. I looked at them, yes.

Q. Did you have anything to do with the preparation of them? A. A portion of them, yes.

Q. One of those exhibits contained a layout of the percentage increase in overhead during the years that I asked you about, didn't it?

A. I imagine it did, yes.

Q. Well, do you know whether it did or not?

(Testimony of Stafford L. Austin.)

A. I will have to look up the brochure.

Mr. Rathbun: May I get that, your Honor?

The Court: Yes.

(Mr. Rathbun leaves courtroom for few minutes, returning with a paper-covered book.)

By Mr. Rathbun:

Q. If the overhead went up from a percentage of cost per ton from 6.25 in the year 1940 to a percentage—strike that. It should be 8.98. To a percentage of 18.13, that would quite considerably affect the value of what you have testified to here, wouldn't it?

A. The overhead going up that way?

Q. Yes. A. It probably would.

Q. Well, it would, wouldn't it? Any doubt in your mind about it?

A. A prospective buyer would probably take that into consideration.

Q. Yes.

The Court: Excuse me. You gave a year for your first figure but not a year for your 18.13.

Mr. Rathbun: Well, I assume up to the date which he testified, which was 1944, the takes in this case.

Q. Do you know what the tonnage of cane grown on all of the lands of the Plantation Company in the year '25 were, or first '24, 1924?

A. I don't know whether I have that here or not. [1270]

(Testimony of Stafford L. Austin.)

Q. Any idea what it was? Oh, pardon me. You said you have it there?

A. I think I have it here. Just a minute.

Mr. Vitousek: May I have the question read?

The Court: Yes.

(The reporter read the last question.)

A. Twenty-six, 26,554 tons. I haven't got '24. I imagine somewhere——

Q. What year did you give?

A. I gave '26.

Q. 1926?

The Court: And the figure, again, was?

The Witness: 26,654.

Q. You haven't got it in '24?

A. No, I haven't got it.

Q. You haven't got it in '25?

A. No, I haven't. Mine starts at '26.

Q. Well, if it was in 1925 approximately 22,000 tons and in 1924 approximately 20,000 tons; and in 1942, 16,329; and in 1943, 25,000, it would show that your cane production was about the same in 1941, in 1943, in 1942 and 1943, that it was in '24, '25 and '26, wouldn't it? A. That would be——

Q. Is that the fact?

A. Well, you said it's 20,000. [1271]

Q. I'm asking you to assume. I see you haven't got it there.

A. Yes, that the cane tonnage produced by the plantation would be about the same, if it was 20,525.

Q. Well, you participated in the preparation of

(Testimony of Stafford L. Austin.)

these exhibits in connection with this claim filed in Congress, didn't you?      A. Yes.

Q. I show you the figures (Showing a document to the witness), shown on table 1 attached to the claim as filed with Congress, and this shows in 1924, 20,220, plantation grown cane, does it not?

A. It does.

Q. Is that correct?      A. That's correct.

Q. In 1925 it shows 22,627 tons?

A. That's correct.

Q. Plantation grown cane. Then you get to 1926, the year that you testified about, and it shows 27,061?      A. Right.

Q. In 1941 it shows 24,088 tons, does it not?

A. It does.

Q. In 1942 it shows 16,329?

A. That's right.

Q. And in 1943 it shows 20,525? [1272]

A. Correct.

Q. Now, that's the total cane grown in those years, wasn't it?      A. That is.

Q. On all of the lands devoted to cane by the Honolulu Plantation Company?

A. Correct.

Mr. Vitousek: If the Court please, this is only a small matter but counsel is reading from what shows sugar production from cane, not cane. It makes quite a difference.

Mr. Rathbun: I'm going by the heading of what I'm reading from, plantation grown cane.

Mr. Vitousek: You look at the other column.

(Testimony of Stafford L. Austin.)

The Court: The witness is talking about tons.

The Witness: I meant sugar, tons of sugar, not cane.

Mr. Rathbun: Well, it doesn't matter one way or another as far as I am concerned.

The Court: That's raw sugar?

The Witness: No, that's refined sugar from the Honolulu Plantation Company.

The Court: And that's what you had in mind when on your direct examination you gave a similar figure for the year, when you gave similar figures for the years 1929 to 1943? You meant tons white sugar?

The Witness: Tons of refined. [1273]

The Court: All right.

By Mr. Rathbun:

Q. In 1943, after all of these takes that you have testified about, the company was able to refine the same amount of sugar as it did in 1924, isn't that correct?      A. That's correct.

Q. Now, you designated certain parts of this property that you testified as to a value as personal property. Did you include in your value all of the crushing machinery and the boilers and mixers and filters, all that contained in the mill?

A. All the milling machinery in the mill.

Q. You treated that as real property, is that it?

A. That's right.

Q. All of it could be removed, taken out, and put into another plant some place, could it not?

A. It could be, yes.

(Testimony of Stafford L. Austin.)

Q. Just a matter of loosening from the floors on most of it, isn't it, from the cement that it is in?

A. Bolted down to cement foundation.

Q. Take the bolts out and the machine would leave physically complete, wouldn't it? Right?

A. Leave the machines, yes.

Q. That's true of practically all the machinery in there, is it not, in the mill? [1274]

A. With the exception of the boilers.

Q. With the exception of the boilers. Well, you'd have to remove the concrete surrounding it, but you'd still get the boilers out, couldn't you?

A. Yes, get the boilers out.

Q. Now, Mr. Austin, in this first take at Hickam Field, insofar as the cane fields that you had left were concerned, they were the same cane fields, the same quality, the same soil as before the take, were they not?

A. Which? You mean the Hickam Field takings were the same as before?

Q. The remaining fields after the take.

A. Oh, after the take, were the same as before the take.

Q. Yes? A. They were the same, yes.

Q. Grow the same kind of cane on them?

A. No.

Q. Use them for the same purpose?

A. But not the same kind of cane.

Q. Didn't change the character of the land any?

A. Not the character of the land.

Q. The lands were worth just as much as before?

(Testimony of Stafford L. Austin.)

A. That you'd have to get some real estateman—they would probably be a little more, depending on the time, and as things have gone along land values have increased. [1275]

Q. That's due to other reasons than the taking of Hickam Field, isn't it? It's due to conditions, labor and more money for sugar maybe or things like that. Did the fact of the taking itself change the character of those cane lands in any way?

A. No, it didn't.

Q. The remainder of the land. They had the same value they would have had if they hadn't taken the Hickam Field land, didn't they, physically? A. Physically they were the same.

Q. Yes. And that is true as to every one of these takes that you have testified about as to the remaining land, is it not, as far as land is concerned? A. Physically it was the same.

Q. Now, as far as the physical instrumentality in this mill is concerned, the taking in the Hickam Field case didn't change whatever those boilers and filters and grinders and everything, did it, physically? A. Physically they were the same.

Q. Didn't change them at all, did it?

A. From the standpoint of the company—

Q. I didn't ask you anything else, please.

A. Physically they didn't change.

Mr. Vitousek: If the Court please, I understand he did have something else. He said value in his first question. [1276]

Mr. Rathbun: And limit it to what I said.

(Testimony of Stafford L. Austin.)

Mr. Vitousek: There's a difference between the answer and the value. Now, there's a difference between them being the same physically and having the same value, and he did have the word "value" in his question.

Mr. Rathbun: I have tried to confine him to physically.

The Witness: No, physically they are the same.

The Court: All right.

Q. Any change that took place because of these takings was a matter of book figures, wasn't it? In other words, put it this way: The only change that caused—the only thing that caused any change by virtue of this take or these takes, was that you had more land—I mean you had more equipment than you needed to work the remaining land, is that right? A. That's a correct statement.

Q. Now, your opinion is that by virtue of the take that had some effect upon the value of what was left? A. That's right.

Q. Now, just tell me how that took place in your mind? A. Well, if you——

Q. Because of what?

A. Well, the fact is this, if you have a great big piece of equipment and you built the whole plantation with the idea of operating in a certain manner, with a certain tonnage, when you don't get that tonnage by reason of a cutdown in the area, then the whole, your whole equipment decreases, there's [1277] a shrinkage in value of the

(Testimony of Stafford L. Austin.)

equipment because you can't do what you put it up to do.

Q. Now, the reason it shrinks on what you have stated is because it costs more to operate it, that's one of the things, isn't it?      A. It does.

Q. Therefore, you make less profit?

A. You make less profit.

Q. That's why it decreases in value, isn't it?

A. That's right.

Q. That profit that would be changed by those takings is a variable thing, isn't it, from year to year?

A. Well, it depends on conditions.

Q. It depends on labor cost?

A. And area and what you have to operate with.

Q. The price you get for sugar?

A. That may be so.

Q. The cost of labor?      A. Correct.

Q. And the basis of your statement, then, on value is that because of this loss of the ability to make profit as large as they could have with a larger acreage, this decrease or shrinkage of value has taken place, is that right?

A. No, that isn't what I said.

Q. It isn't what you said? [1278]

A. I said the value of the whole plant takes a shrinkage in value due to the fact that you are losing some of your productive areas.

Q. Just what makes the plant shrink, then? What is it, the process of what?

A. Of cutting down on the number of tons of cane, sugar going through the mill.

(Testimony of Stafford L. Austin.)

Q. You don't care anything about that or any other corporation, the number of tons going through the mill—it's profit they are interested in?

A. Correct.

Q. And that's the only basis on which anybody would buy it, with the prospect of making money out of it?

A. Absolutely, yes.

Q. And if they made less money because of less acreage, they'd pay less money for it, wouldn't they?

A. They would.

Q. And that's profit, isn't it. That's what they are looking at, is possible profit? The shrinkage takes place because of the difference in profit, isn't it?

A. Not always.

Q. Well, what other thing does bring that about, a decrease in the value of it? The same physical property, you said? They haven't changed any? I'm waiting for an answer.

A. What was the question, again? [1279]

(The reporter read the last question.)

Mr. Vitousek: Now, if the Court please, what is the question? Is the second part the question? It's the same thing we have been objecting to counsel making a statement after he asks the question. I think the question should be asked based on a certain assumption. Then the question is clear. But the question was asked and then another statement made which we don't know whether it's a question or not. It's made by counsel.

Mr. Rathbun: I think if you will listen you will find out whether it's a question or not. I think it's a question.

(Testimony of Stafford L. Austin.)

The Court: You have a habit of putting two questions at once.

Mr. Rathbun: Well, I'm explaining to him so he won't wander off to another subject. I have to do that.

The Court: I can understand that. May I have the last question again?

(The reporter read the last question.)

By Mr. Rathbun:

Q. Now, your physical properties haven't changed any?

Mr. Vitousek: Just a minute. Is this another question?

Mr. Rathbun: I'll make another question.

Q. Have they? A. Not at all.

Q. They weren't affected at all by these takes physically? [1280]

A. Physically, the same size.

Q. But you still say there's been a decrease in the value of the plant as a whole, including the lands and the machinery and everything in that mill, didn't you? A. That's right.

Q. Now, just what process is it that brings about that decrease?

A. You want me to go through the same thing that I did before?

Q. I don't know what you did. I want an answer.

Mr. Vitousek: If the Court please, he has answered that question several times and it's being repetitious, if he wants to go through it again.

(Testimony of Stafford L. Austin.)

Mr. Rathbun: He hasn't answered that question.

The Court: Well, I'd like to have it answered again.

A. If you have a big plantation, you set it up for a certain tonnage, and you find yourself sooner or later with less tonnage than you can put through the mill efficiently, therefore the value of your whole plant has decreased, shrunk.

Q. Now, just what do you mean by "efficiently?"

A. Efficiently means getting the most out of the machinery involved.

Q. So that you'd get more tonnage?

A. That's right.

Q. And get more money? [1281]

A. Well, some more money. That's what you are in business for.

Q. That's right. That's what I thought. Therefore, you want to get more profit, all that you can get, by increasing the tonnage, don't you?

A. That's what we are in business for, to get some profit. If you didn't get profit you wouldn't go into business.

Q. That's right. And if you decreased the sugar acreage and the tonnage of cane that you put through the mill, you decrease the money that you will get for it, don't you, on that plantation?

A. You decrease the value to the stockholders of that plantation.

Q. And a man that was looking at it to buy it then would look to see whether or not with that equipment that you have, and with the cane area

(Testimony of Stafford L. Austin.)

that you have, he could have paid as much for it as he could have before, is that it?

A. That's it, yes.

Q. Now, would he at all consider the question of whether or not with that equipment as it is after these takings, with the cane land as it is in the same physical condition, would he consider at all the fact that he could only make a certain return on the amount of money that he paid for it?

A. He would certainly consider the amount of money he would make on it. [1282]

Q. Then he would judge what he could make in determining the amount that he could pay, wouldn't he?

A. That would be taken into consideration.

Q. It would be a big consideration, wouldn't it?

A. I imagine so.

Q. The controlling one, is that right?

A. He wouldn't go into business if he couldn't make a little money.

Q. Of course he wouldn't. Now, that difference in profit is what makes the difference in value, is it not, the difference in possible profit?

A. It is the difference between whether it's a going concern or it isn't.

Q. It's going, we'll all assume that.

A. It was in 19—when you are talking about, yes.

Q. It still is?

A. It's now going, yes, but it has lost its value. That's why it had to be sold.

(Testimony of Stafford L. Austin.)

Q. It lost its value because you can't make as much money on your investment?

A. A losing proposition.

Q. Because you can't make as much profit, that's the reason, isn't it?

A. Well, I imagine you have to get something out of it or you wouldn't operate it. [1283]

Q. Of course. But will you please answer my question? Read it again.

(The reporter read the last question.)

Q. Now, do you know what the last question is?

A. That a man wouldn't buy it until he knew there was some profit in it.

Q. That isn't my question. Of course, we'll all assume that. A man wouldn't buy it to lose money. Now, there's no use of wasting any more time on that.

The Court: I don't know what your last question is either. Will you state it again?

Q. Assuming the same capital investment, would a man pay more or less for it if three thousand acres of land were taken away and the profit thereby decreased on the equipment in that mill being as it is?

Mr. Vitousek: Now, if the Court please, that question is the same thing we have been objecting to as causing confusion. What is capital investment? Is he talking about the original capital investment, the purchase price of the new machinery, or what is he talking about? It is not intelligible, it is not an intelligible question that one could an-

(Testimony of Stafford L. Austin.)

swer, assuming the same capital investment and then take away land. You don't necessarily take away the capital investment. The investment remains the same. If someone comes along and buys it at a less figure, that's his capital investment. Now, what capital [1284] investment are we talking about? Is it the original investment of Honolulu Plantation, of a possible purchaser, or what? And we submit this question is not intelligible.

Mr. Rathbun: If there is any confusion in the witness' mind, I'll take Mr. Vitousek's statement for the question that the capital investment remained the same.

Mr. Vitousek: Well, it isn't Mr. Vitousek asking these questions. We submit the question should be framed so it is clear.

The Court: May we have the last question?

(The reporter read the last question.)

Q. Would he pay more or less?

The Court: The witness can answer. And you may have an exception. The witness can answer.

A. Pay less.

Mr. Rathbun: May we have an adjournment?

The Court: You said "adjournment." You meant recess?

Mr. Rathbun: I meant recess.

The Court: Yes.

(A short recess was taken at 12:15 p.m.)

After Recess

By Mr. Rathbun:

Q. Mr. Austin, in the properties that are in-

(Testimony of Stafford L. Austin.)

volved in these proceedings, you are familiar with them, aren't you, by case numbers, etc.? [1285]

A. I am. Call them out. I know where they are.

Q. The record shows what they are. Now, as to leases, you can use the Judge's map on this and you will be able to follow me on that.

The Court: Exhibit 8.

Q. Civil 514. That's under the Damon lease in evidence as Exhibit—I've forgotten what.

The Court: 9-G.

Mr. Rathbun: I think so.

Mr. Driver: 9-K.

The Clerk: 9-K is the Damon.

Q. All right. Now, 514, the land covered in that case, so far as the Honolulu Plantation Company is concerned, is covered by Exhibit 9-K, is it not?

A. With the exception of a small piece which is on Queen Emma.

Q. All right. That's how many acres, about, the small piece?

A. About six or seven acres, small.

Q. Six or seven acres? 521, that is not a Damon lease, is it?

The Court: 521?

Mr. Rathbun: 521.

A. 521?

Q. That's McGrew Point on the shore of Pearl Harbor there. [1286]      A. Excuse me.

Q. Jutting out into the harbor there.

A. No, that's McGrew.

Q. Yes. That is not under the lease 9-K, is it?

(Testimony of Stafford L. Austin.)

A. No, it's not.

Q. 525 is, is it not?      A. 525 is.

Q. 529 is not, isn't that correct?

A. 529 is not.

Q. 533?      A. 533?

Q. The yellow up here?      A. That is not.

Q. And 535?      A. 535 is not.

Q. 544?      A. 544 is.

Q. 548?      A. 548 is.

Q. 527?      A. Is.

Q. 532?      A. 532 is not.

Q. And 536?      A. 536 is not. [1287]

Q. And 540?      A. Is not.

Q. 684?      A. Is not.

Q. Now, in 514, 525—

A. Wait a minute. That's right.

Q. That is in?      A. What's that?

Q. That is under the Damon lease, up to the margin of the Queen Emma land, right?

A. Yes, 684.

Q. Now, 514, 525, 544 and 548, 527 and 684, being leases from the Damon Estate, covered by lease 9-K, approximately how many acres are involved there as far as the Damon Estate is concerned?

A. Oh, that's about 300 acres, a little over.

Q. Isn't it more than that? There's 300 acres in 544, isn't there, 317?

A. Oh, yes. That's the first. Above that field is about 87 acres. That's field 84 and add that to it.

(Testimony of Stafford L. Austin.)

The Court: I don't think you are both talking about the same thing.

Mr. Rathbun: We are not.

The Court: He is asking you with reference to these cases where the Damon lease and only the Damon lease is involved, [1288] as total how many acres does the Damon lease include.

Q. I can shorten this by leading you and you can tell me if I am approximately correct or not, if it will help me, Mr. Austin. There's 257 acres involved in our taking in 514. Now, that's all Damon property, isn't it?

A. That's all Damon land, yes.

Q. Under the Damon lease?

A. That's correct.

Q. 525, same thing is true and that involves 216 odd acres, is that correct?

A. That's correct.

Q. 544, same is true, is it not? That involves 317 odd acres?

A. With the exception of a small piece in 81, in field 81. I mean there's a small piece of Queen Emma in there.

Q. How many acres, about?

A. I think there must be about 14 or 15 acres in that piece.

Q. Except for that, the rest of it is Damon land, isn't it? A. That's right.

Q. Under the Damon lease? A. Correct.

Q. 548, that's a wandering strip?

A. That's in the Salt Lake crater. [1289]

(Testimony of Stafford L. Austin.)

Q. Yes. That's all Damon, isn't it?

A. That's right.

Q. Sixty-three odd acres? A. Correct.

Q. And 527?

The Court: Twenty-seven?

Q. 527?

A. 91 and 107. There's over a hundred acres in there.

Q. That's Damon, isn't it? A. Damon.

Q. Well, the exact acreage on our taking in 527 is 93.355. That's all Damon? A. All Damon.

Q. And 684 comprises 29.891 acres. That's all Damon, isn't it? Pardon me, that isn't all Damon. It's Damon up to the Queen Emma limit.

A. Two pieces.

Q. And how many acres in the Damon part of it, if you can approximate it?

A. I know there were 19 acres in all, I think, but there may be four or five acres, the near portion.

Q. Four or five acres? All right. Somewhere in the neighborhood of 950 acres under the Damon lease in those cases, isn't that right?

A. That's correct, yes. [1290]

Q. Now, getting back again to your testimony as to the value of the remaining lands after the takings in these cases, if Honolulu Plantation Company on the date that you gave, June 21, 1944, had no lease, in other words, the lease had theretofore expired by its terms, you wouldn't charge anything up against the United States Government for any de-

(Testimony of Stafford L. Austin.)

crease in value because of that, would you, because of the takings in those cases?

A. That would reduce the takings if they had no lease.

Q. You wouldn't charge anything against us for that, then, would you?

Mr. Vitousek: If the Court please, there's a legal assumption there. We are going to argue this out.

Mr. Rathbun: That may be.

The Court: And because it is an assumption, he may answer it, and we will hear the argument later. Due to the rain, you will all have to speak louder than usual. I haven't clearly in mind an answer to that question; I think he gave one but I didn't get it. Did you answer it? If you haven't we will give you an opportunity to answer it.

The Witness: Yes, I answered it. I said if there was no lease then you wouldn't charge anything up against it.

Q. All right. Now, this question of how much you make on your capital investment, or whatever you call it, money in property, again it is a variable thing, it changes, does it not? [1291]

A. It changes from year to year.

Q. It depends on a number of things, like labor costs; those change, don't they?

A. Labor cost, yes.

Mr. Vitousek: That's been asked and answered already several times before. We have gone into labor cost change and various other elements.

The Court: Well, in a slightly different way.

(Testimony of Stafford L. Austin.)

Mr. Rathbun: In a different purpose.

The Court: You are asking about charges against labor?

Mr. Rathbun: Labor. Labor varies quickly?

A. Labor costs do vary.

Q. And likewise the variance of those labor costs is an element that affects the amount of profit that can be made, is that right? A. Correct.

Q. Price of sugar varies, does it not?

A. It does.

Q. Likewise the variance in that price has its effect upon the amount of money that can be made, does it not? A. It has.

Q. The question of management also affects it, affects it, does it not? A. It does.

Q. Now, to that extent these things are speculative, more or less, being variable? [1292]

A. Well, you can forecast pretty well what is going to happen.

Q. You can't do it accurately, can you?

A. Pretty accurately. I have been doing it for 25 years.

Q. Supposing there was a strike that took place in which they raised the wages a hundred percent, is that something that you could forecast next year?

A. We probably could forecast we are going to have another strike next year, and the price of sugar would go up.

Q. And did it go up that much?

A. A hundred dollars a ton.

Q. Percent, wages?

(Testimony of Stafford L. Austin.)

A. No, you couldn't very well forecast that.

Q. Of course you couldn't. One man with his ability, or one set of men with their ability might take the same equipment that you have in the Honolulu Plantation Company plant and make ten or twelve percent on the investment, while another man with lesser ability, management ability, might take the same equipment and lose money, isn't that possible?

A. It depends on what kind of equipment. If you take—when was it, when do you want it?

Q. Any time.           A. Any time?

Q. That could vary, couldn't it? [1293]

A. Oh, it could vary, yes.

Q. Management has a great deal to do with it?

A. It has something to do with it.

Q. Now, again calling your attention to this table 1 in connection with the claim filed in Congress, which you participated in as you have said, under the heading "Plantation Grown Cane," does that refer to sugar production?

A. It refers to sugar production.

Q. But at first it refers to the sugar production raised on the Honolulu Plantation Company land, etc., leased or in fee?           A. Correct.

Q. There's another column of sugar bought from outside people?           A. Outside raw.

Q. So the figure you testified to pertains to plantation grown cane?           A. That's it.

Mr. Vitousek: If the Court please, that is not clear either, because this isn't it. He pointed out

(Testimony of Stafford L. Austin.)

under this heading refined sugar produced from plantation grown cane. The figures are not cane. They are sugar producing cane.

Mr. Rathbun: That's right.

Mr. Vitousek: He said he referred to figures and he referred to plantation grown cane. We are a little interested in this record, too. [1294]

Mr. Rathbun: Well, I'm satisfied with this cross-examination. You can put what you please on those.

Mr. Vitousek: Well, under all rules——

The Court: I think it's clear now. Proceed.

By Mr. Rathbun:

Q. In the year 1931, on 5,547 acres of cane under cultivation the Company had a net income available for interest on its investment of \$168,479, is that correct? (Showing a document in evidence to the witness.) A. 1931?

Q. 1931. A. Yes.

Q. In the year 1941, on 4,614 acres of cane under cultivation, they had a net income available for interest on their investment of \$187,140.46, is that correct? A. That's correct.

Q. And in that year of '31 you brought into the plant, 10,491.05 tons of outside raw sugar, didn't you? A. Correct.

Q. And in 1941 you brought in outside raw sugar to the extent of 8,684.4 tons?

A. Correct.

Mr. Rathbun: I think that's all, your Honor.

The Court: Redirect?

(Testimony of Stafford L. Austin.)

Mr. Vitousek: If the Court please, I'm going to have to [1295] check these records now on the areas taken under these various suits in cross-examining, and I suggest we recess until tomorrow for redirect.

The Court: Do you have any objection?

Mr. Rathbun: No, your Honor. I think we might save time.

The Court: We'll adjourn, then, for the day, resuming tomorrow morning at nine.

(The Court adjourned at 12:50 p.m.)

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Honolulu, T. H., December 10, 1946

The Clerk: Civil No. 514, United States of America versus 257.654 acres of land, and Civil Nos. 521, 525, 527, 529, 532, 533, 535, 536, 540, 544, 548 and 684, for further trial.

The Court: Are the parties ready?

Mr. Vitousek: Ready.

The Court: Mr. Austin, I will remind you that you are still under oath. And you are ready for redirect examination.

STAFFORD L. AUSTIN

a witness in behalf of the Defendants, having previously been sworn, resumed and testified further as follows:

Redirect Examination

By Mr. Vitousek:

Q. I asked you yesterday, Mr. Austin, to check through the records of the company to get the exact

(Testimony of Stafford L. Austin.)

acres taken in these various suits, and you have handed me some summaries this morning. Were these prepared by you or under your direct supervision and check? (Showing several sheets of paper to the witness.) A. They were.

Q. The first here is what you headed the "Main Hickam Field Taking." What suit is that in?

A. That's Civil suit No. 289. [1297]

Q. Was that the first Hickam Field taking?

A. That was the first Hickam Field taking.

Q. What does this schedule show?

A. That there was 638.25 acres taken in——

Q. What kind of land?

A. Bishop Estate land, 172 acres; Queen Emma Estate land, 344½ acres; and Damon Estate land, 121.75 acres, making a total of 638 and a quarter acres.

Q. Was that cane land or——

A. That was all cane land.

Q. What was the total acreage involved?

A. The total acreage involved was 760 acres.

Mr. Vitousek: If the Court please, we offer this in evidence.

The Court: Any objection? Hearing none, the same may become——

The Clerk: Honolulu Plantation Exhibit No. 10.

(The document referred to was received in evidence as Honolulu Plantation Company's Exhibit No. 10.)

[Printer's Note: Exhibit No. 10 is set out in full at page 1534 of this printed Record.]

(Testimony of Stafford L. Austin.)

Q. Do you recall when that land was taken from the control of the company? A. 1935.

Q. Thirty-five? You mentioned yesterday preparation of a claim before Congress. Was this taking the subject of that claim? [1298]

A. No, it was not.

Mr. Driver: You say this taking. You mean what?

Mr. Vitousek: Referring to the exhibit, the first Hickam Field taking.

Q. Now, I show you here a schedule headed "Prior Consolidated Takings." Was that schedule prepared by you or under your direct supervision? (Showing a sheet of paper to witness.)

A. It was.

Q. Did you check it? A. I did.

Q. What takings and what suits are the takings there shown involve?

A. Civil Suit No. 416. There was Queen Emma land, 67.20 acres—this is cane land; Bishop Estate cane land, 73.06 acres.

Mr. Driver: Where's that on here? Just a minute.

A. Or a total of cane land for the suit, 140.36 acres. In Civil Case No. 430, Bishop Estate, 17.58 acres; Civil Suit No. 434, Damon Estate, 70.96 acres, total for the suit in cane, 70.96. Civil Suit No. 436, Damon Estate, 244.47 acres in cane; total for the suit in cane, 244.47. Civil Suit No. 442, Queen Emma Estate, 110.8 acres; total for the suit in cane was 110.48 acres. Four hundred fifty-two,

(Testimony of Stafford L. Austin.)

Bishop Estate, point 67—correction, 67.29 acres total cane in the suit. Making a grand total of cane land in the suit of 651.04 acres. [1299]

Q. Now, referring again that that schedule—

The Court: Excuse me a minute. A grand total in all of those cases?

The Witness: Of cane land, yes, of 651.

The Court: From the first Hickam Field taking to the last?

Mr. Vitousek: No, if the Court please, from 416 to 452.

The Court: All right.

Q. Referring to this schedule you have in your hand, it has the number of cases involved in which the takings are involved as shown on the schedule, is that right? A. That's right.

Q. And the owner, it has the owner of the fee simple? A. That's right.

Q. And the total acres in suit, that doesn't correspond with your cane total. Were there others?

A. No, because there's waste land and other areas involved.

Q. Then you show the cane field number. What does that refer to?

A. That refers to the number of the cane fields that are shown on the plantation map.

The Court: Exhibit 1, that map?

The Witness: Exhibit 1.

Q. Then the date taken? [1300]

A. There's the date of the suit.

Mr. Vitousek: If the Court please, we offer this exhibit in evidence.

(Testimony of Stafford L. Austin.)

The Court: Any objection? Hearing none, the same may become——

The Clerk: Honolulu Plantation Exhibit No. 11.

(The document referred to was received in evidence as Honolulu Plantation Company's Exhibit No. 11.)

[Printer's Note: Exhibit No. 11 is set out in full at page 1535 of this printed Record.]

Q. Mr. Austin, referring you to Exhibit No. 6 introduced in this case, which shows the details of the areas taken——

The Court: In these 13 cases?

Mr. Vitousek: Presently before the Court.

Q. I asked you to make a summary showing the details by owners of the total by owners of cane land taken. Did you do so?

A. I did so, yes.

Q. I hand you a statement here, "Summary From Exhibit 6"; in general terms what does that show?

A. It shows that suit 514, Damon land, 119.21 acres; Queen Emma, 15.28 acres—that's all cane land; 521, no cane; 525, Damon, 66.82 acres; 527, Damon, 85.74 acres; 529, Bishop Estate, 176.67 acres; Hawaiian Land and Improvement Company, 103.64; McCandless, 3.25; fee, .18.

Q. What is that fee you refer to?

A. That's Honolulu Plantation Company fee.

Q. All right. Go ahead.

A. 532, no cane; 533, Oahu Sugar Sublease, 48.61 acres; 535, that's suit 535, 131.893 acres for Bishop Estate; McCandless, .545; fee, 2.732.

(Testimony of Stafford L. Austin.)

Q. That refers——

A. To the Honolulu Plantation Company.

Q. All right.

A. 536, no cane; 540, no cane; 544, Damon, 294.01; 548, Damon, 25.30; 584——

Q. 584? A. Yes.

Q. Is that 5 or 6?

A. I mean 684. My mistake. Damon, 3.93; Queen Emma, 6.51; Bishop Estate, 3.27. The totals for those, for all those cases with respect to the landowners, was, Damon, 595.01 acres; Queen Emma, 21.79 acres; Bishop Estate, 311.833 acres; Hawaiian Land and Improvement Company, 103.64; McCandless, 3.795; Oahu Sugar Sublease, 48.61; fee, 2.912. Grand total, 1087.59 acres.

Mr. Vitousek: If the Court please, we offer this summary in evidence.

The Court: It may become the company's exhibit next in order.

The Clerk: Honolulu Plantation Exhibit No. 12.

(The document referred to was received in evidence [1302] as Honolulu Plantation Company's Exhibit No. 12.)

[Printer's Note: Exhibit No. 12 is set out in full at page 1537 of this printed Record.]

Q. Mr. Austtin, referring to the first Hickam Field taking,—that was suit 289—will you state whether or not the company was able to secure any additional cane lands after that suit?

The Court: That's the first Hickam Field taking? Do you have the question in mind?

(Testimony of Stafford L. Austin.)

The Witness: I have the question.

The Court: You may answer.

A. After the Hickam Field taking, the Honolulu Plantation Company—and after the leases were set with the various estates in 1936—proceeded to take in more land on the upper stretches of the plantation. Before the Hickam Field taking the plantation was operating at 550 feet, at a 550 foot elevation, was the top limits of the fields. They then revamped their water system and proceeded to take in the lands from the 550 foot level to 650 foot level. And in that way, at the time of the next takings, the plantation area was about up to where it was before the taking, the Hickam Field taking.

Q. Yesterday, Mr. Austin, you were asked the tonnage produced out of the plantation, I recall in 1924 and subsequent dates. I'd like to have you give the tonnage in between those dates.

Mr. Rathbun: May I have that question?

(The reporter read the last question.) [1303]

Mr. Rathbun: Between what dates?

By Mr. Vitousek:

Q. Before you answer that question, what was the year? I believe that you gave yesterday '24, I think. A. 1924.

Q. What was the figure?

A. 20,220.62 tons.

Mr. Rathbun: What year is that?

The Witness: 20,220.62 tons of refined sugar from plantation owned cane.

(Testimony of Stafford L. Austin.)

Q. Now, what was the last figure you gave yesterday?

A. 1943, I think, was the figure I gave yesterday.

Q. Well, I want to get those in between those dates.

Mr. Rathbun: Well, in between what?

Mr. Vitousek: 1924 and 1943.

Mr. Rathbun: You haven't said that yet.

A. From plantation owned cane only?

Q. Well, what have you? Do you have plantation owned cane? Is there other cane?

A. Sugar from outside raws.

Q. On outside raws?

A. And some sugar from outside cane.

Q. Well, give all figures in totals. Before you give that, does that refer to refined sugar or raw sugar?

A. Refined. [1304]

Q. But not to cane? A. Not to cane.

Q. It is the amount produced?

A. From cane.

Q. Or amount purchased?

A. Outside raw.

Q. All right.

The Court: Excuse me. Haven't we already got that as from '29 to '43 when he was talking about the mill's capacity? The other dates were talked about another time.

(Discussion off the record.)

Mr. Vitousek: I'll withdraw that question.

Q. I will ask you first, Mr. Austin, to give the

(Testimony of Stafford L. Austin.)

tonnage of refined sugar manufactured from cane raised by the plantation in the years—does that include '29?

The Court: Yes.

Q. —from the years 1924 to 1928 inclusive?

A. 1924, 20,220—correction, 20,220.62 tons; 1925, 22,627.10 tons; 1926, 26,654.67 tons; 1937, 30,545.93 tons.

Mr. Rathbun: Just a minute now. Take it easy on those figures. What is the last figure?

(The reporter read the last figure.)

A. 1928, 34,653.17 tons.

The Court: Just a minute. Those figures then will fit on to the figures you gave yesterday when you were talking about [1305] the capacity of the mill, and it was in connection with cross-examination that you gave all of those figures, so that those yesterday and the ones you are giving today in terms of tonnage from 1924 to 1943 inclusive represent refined sugar made from cane you grew on the Honolulu Plantation?

The Witness: That's right.

The Court: It is exclusive of raw sugar that you bought?

The Witness: Exclusive of raw sugar, outside cane.

Q. Now, Mr. Austin, you stated you purchased some cane during that period?

A. Yes, some cane during the period.

Q. Would you give the amount of refined sugar manufactured at the Honolulu Plantation Com-

(Testimony of Stafford L. Austin.)

pany from outside cane purchased? What years did that occur?

A. 1926, 1927. You want me to give the tonnage along with it?

Q. Yes, give the tonnage and the years purchased. A. 1926, 825.28——

Mr. Rathbun: Eight?

The Witness: Yes.

A. ——tons of sugar made from cane, cane purchased on the outside.

The Court: That's white sugar?

The Witness: Yes, refined.

A. (Continuing): 1927, 970.82 tons of sugar from outside [1306] purchased cane; 1928, 526.11 tons; 1929, 412.31 tons; 1930, 244.48 tons.

Mr. Rathbun: What is the last figure?

The Witness: 244.48.

A. (Continuing): 1931, 56.87 tons; 1932, 237.70 tons.

Mr. Rathbun: Now, wait a minute. You're going too fast, please.

The Court: Can't you ask him nicely?

Mr. Rathbun: Will you give me the next to the last one, 1930?

(The reporter read the last figures requested.)

A. (Continuing): 1933, zero; 1934, 55.33 tons; 1935, 49.01 tons; 1937, 58.20 tons.

Mr. Rathbun: What about '36?

The Court: 1936?

A. Oh, 1936, zero.

The Court: 1937 again?

(Testimony of Stafford L. Austin.)

A. 58.20 tons; 1938, zero; 1939, 41.09 tons; 1940, 40.93 tons; 1941, zero; 1942, 4,114 tons.

The Court: Once again?

A. 4,114.98 tons; 1943, 724.10 tons.

Mr. Rathbun: Just a minute, please. Will you give me '43 again?

(The reporter read the 1943 figure.)

By Mr. Vitousek:

Q. Mr. Austin, the purchases prior to 1942 were made [1307] from what type of grower, what type of grower? A. Prior to when?

Q. 1942.

A. Prior to 1942 was from—Mr. McCandless had seven and one-half acres of cane land right next to the plantation and we ground his cane. And also before that time we received cane from way over next to Waialeale Boys School; used to come across by Libby, McNeill and Libby's cane; they grew some cane there and they used to send it to us in big gondolas and we ground it for them. And that's where we got the cane from.

Q. Well, is that cane now available?

A. No, no cane available now.

Q. Now, in 1942 your figures show a large amount of sugar produced from cane. Where did you get that cane?

A. In 1942 we went over and helped Oahu Sugar Company take off some of their fields right next to the Honolulu Plantation Company, and that's where the large tonnage of—

Q. Well, how did you happen to do that?

(Testimony of Stafford L. Austin.)

A. — Waipahu was. Oahu Sugar Company was behind and at the same time we were running under capacity, so we agreed to help them harvest their cane. Instead of taking it over to Waipahu where they were running to full capacity, we took it to Aiea and ran it through our mill on a contract arrangement. And that was the same, that was true of 1943 when we took 724 tons of sugar off Oahu Sugar Company. [1308]

Q. Well, any particular reason or occurrence causing them to be behind in '42, the Oahu Sugar Company? A. In 1942?

Q. Yes.

A. Well, the reason they were behind in 1942 was on account of the blitz and the fact that they had to in 1942, had to send a great many of their men out to help the Army do their work on the various projects that they had.

The Court: Just a minute before you go further. I'm confused on this sugar business. I understand your figures about refined sugar from your own cane. Now you have been talking about cane purchased from other places and ground into refined and white sugar.

The Witness: Yes.

The Court: I was under the impression that you also told us yesterday about some raw sugar that you acquired.

Mr. Vitousek: We are coming to that next. There are three categories.

The Court: Three categories?

(Testimony of Stafford L. Austin.)

Mr. Vitousek: Yes.

Q. Well, can you state whether or not you would be able to purchase cane as shown there in '42 and '43 at other dates if the war was over?

A. No, there's no market, no cane on the market that one could buy unless—— [1309]

Q. Now, Mr. Austin, you also testified as to purchase of raw sugar to make refined sugar from at the Honolulu Plantation Company mill. Would you give—I'll withdraw that. When did you first start purchasing raws?

A. When did we first start purchasing raws?

Q. Yes.

A. Well, the refinery was started in 1907.

Q. Seven? A. Seven, yes.

Q. Well, commencing with comparable years, 1924, would you give the quantities of refined sugar made from raw sugar purchased by the Honolulu Plantation Company?

A. 1924 is 189.01 tons of sugar, refined sugar made from outside raws; in 1925 there was 1613.45 tons; 1926, 649.55 tons.

The Court: A little slower.

A. (Continuing): Twenty-seven, 983.40 tons; '28, 375.72; 1929, 620.40 tons; 1930, 10,234.50 tons; 1931, 10,491.05 tons; 1932, 10,081.45 tons; 1933, 12,126.85 tons; 1934, 11,256.20 tons; 1935, 12,130.55 tons; '36, 13,102.85 tons; '37, 9,788.85 tons; 1938, 7,947.45 tons; '39, 8,769.25 tons; 1940, 8,747.75 tons; '41, 8,684.60 tons; '42, 19,042.48 tons; '43, 28,942.40 tons.

(Testimony of Stafford L. Austin.)

Q. Now, Mr. Austin, prior to 1942, running back from '41 inclusive, where did the Honolulu Plantation Company purchase its raws? [1301]

A. From Waimanalo Sugar Company, total output of Waimanalo Sugar Company, and infrequently from, a little from Waialua, some independent planters had.

Q. Any other place? A. What was that?

Q. Any other place?

A. And from Kaeleku Sugar Company.

Q. You testified that sugar from Kaeleku is no longer available? A. That's right.

Q. How about these planters at Waialua?

A. They are no longer, they have gone out of existence, too.

Q. And in 1942, which shows a sharp increase, 1942, 1943, you testified those sugars were secured from Oahu Sugar Company?

A. From Oahu Sugar Company and other plantations on this island. They were purchased direct from California and Hawaiian.

Q. That's under the arrangement you testified about previously on direct? A. Yes.

Mr. Vitousek: That's all, if the Court please.

The Court: Recross? [1311]

Recross-Examination

By Mr Rathbun:

Q. When you testified to Exhibit 10, the acreage **taken on the Hickam Field take**, what year did you have in mind that that taking took place?

(Testimony of Stafford L. Austin.)

A. In what year?

Q. Yes.

A. That's 1935 or '34, I'm not sure which is the exact date.

Q. How many acres did you say there were on that take?      A. Six hundred, 651 I think I said.

Q. Did you give 638.25?      A. 638.25?

Q. On this Exhibit 10.      A. Yes.

Q. What other Hickam Field take was there? You say that's the first take?      A. Yes.

Q. What other take was there at Hickam Field?

A. There was field 96 and 95. I think there were—are you familiar with the map?—field 95 and part of 96.

Q. How many acres?

A. For a housing layout.

Q. When were those taken?

A. Those were taken, they were taken right after field [1312] 81, about 1940, or '41, I'm not sure.

Q. Well, then, they are included in the takes shown on Exhibits 10, 11 and 12, is that it?

A. Ninety-five taken, shown in the 434.

Q. O.K. And they are on those exhibits?

A. That's right.

The Court: Civil 434?

Q. And what fields are involved in this first Hickam Field take?      A. In the first?

The Court: Exhibit 10.

A. Ninety-eight, ninety-nine.

(Testimony of Stafford L. Austin.)

Q. How about 97? A. One hundred.

Q. Wait a minute.

A. Ninety-seven, old ninety-seven.

Q. Field 97?

A. Old 97. They changed the numbers.

Q. O.K.

A. One hundred one, 102, 103, 104, 105, 106 and a portion of 107.

Q. Now, you say those were not included in the claim before Congress?

A. No, they weren't.

Q. Are you sure of that, are you? [1313]

A. Yes, I'm sure about that.

Q. Don't you know that Mr. Schmutz made those a table 5 in connection with that claim, set forth those very fields with a total of 614 acres in your claim to Congress?

A. You will have to ask him about that.

Q. Well, I'll show it to you. You collaborated in the making of this, didn't you?

A. Yes, I helped.

Q. You said yes you did?

A. Yes, I helped make it.

Q. Then you looked it over, didn't you? You looked it over before it was filed? (Showing a document in evidence to the witness.)

A. Yes. He has them down here, yes, 614 acres.

Q. Well, that's an exhibit used by Mr. Schmutz in presenting your claim to Congress, isn't it?

A. That is.

Q. That's his material—right?

(Testimony of Stafford L. Austin.)

A. That's right.

Q. You knew about it, didn't you, when it was filed?

A. I knew about it.

Q. Did you forget about it now?

A. No, but it wasn't used in any, as far as I know it wasn't made—it's part of the record there but it wasn't included in the damages. [1314]

Q. These things were all included by Mr. Schmutz to illustrate the basis of his claim?

A. I imagine so.

Q. You know that, don't you?

A. I don't know exactly what he was thinking about when he made it.

Q. Well, he certainly had no purpose in thinking about anything except to help you put a claim to Congress, did he?

A. That's probably right.

Q. And anything that he used was for that purpose, wasn't it.

A. I imagine so.

Q. Now, you gave the tonnage in 1924 of 20,220.62 acres as representing cane or sugar produced from cane grown on Plantation fields, is that right?

A. That's right.

Q. You gave the years '25, '26, '27 and '28, right?

A. Correct.

Q. Why did you stop there? Did you have any reason for that and not go on through to '43?

A. Because the Judge asked me to stop.

The Court: You understand that situation? He gave the figures from there on yesterday.

Mr. Rathbun: I don't know whether he did or

(Testimony of Stafford L. Austin.)

not. The figures he gave this morning disagree with these. [1315]

The Court: Well, the reason he stopped was that was that I asked him if the figures from there on were the same ones he gave yesterday, and he said yes.

Mr. Rathbun: They weren't the same this morning as he gave yesterday.

Mr. Vitousek: Well, if the Court please, they are talking from two different figures.

The Court: There is even some confusion in my mind on the point. But that's why he stopped.

Mr. Rathbun: I can straighten it out.

The Court: Go ahead.

By Mr. Rathbun:

Q. Now, what was your tonnage from plantation grown cane in 1925? A. 22,627.10.

Q. And in '26? A. Was 26,654.67.

Q. Now, is that the same amount that you represented to Congress was produced from plantation grown cane in your claim filed?

A. I wouldn't know. This is from our annual reports, and those——

Q. I don't know which is right.

A. ——and those may have a carry-over one way or another.

Q. I don't know what they have. [1316]

A. These are right. All I know about.

Q. All right. You wanted to make these right when you represented this to Congress, didn't you?

A. Oh, I imagine so, but I didn't make these up.

(Testimony of Stafford L. Austin.)

Q. Well, I don't know.

A. Some person in the office made them up, and I didn't check every figure that they made. These are made by myself and I'm sure of these. (Referring to another document.)

Q. In 1926 this shows 27,661.60, doesn't it?

The Court: Just a minute. There are too many "these" and "this" without identification.

Mr. Rathbun: Well, I refer to the claim to Congress.

The Court: And when the witness talks?

Mr. Rathbun: Specifically, on table 1, exhibit attached to that claim.

The Court: Just a minute. The witness talks about a book that he has in his hand.

Mr. Rathbun: Well, I'm not interested in his book.

The Court: No, but I want the record straight.

Mr. Rathbun: But I'm asking the questions, your Honor. My question is directed to this right here.

The Court: Just a minute. He said "these" he knew to be correct, and he referred to the book he had in his hand from which he gave us the figures this morning.

Mr. Rathbun: Yes. [1317]

The Court: I simply want to get these identified in the record. You talk about "this". I want that identified in the record as the document you are holding in your hand, namely, some Congressional claim.

(Testimony of Stafford L. Austin.)

Mr. Rathbun: Which I have identified as table 1.

The Court: That's right. The other document should be identified, too.

Mr. Rathbun: I'm not going to be bound by this. I don't want to be bound by what he's got in his hand.

The Court: Proceed.

By Mr. Rathbun:

Q. In 1926, you showed that in the representation to Congress as being 27,061.60, did you not?

A. Twenty-six — (Looking at Mr. Rathbun's document)—that's 1927, twenty-seven thousand—

Q. That's twenty-six. A. Yes, 27,061.

Mr. Vitousek: What was that year, please?

Mr. Rathbun: Twenty-six.

The Witness: 1926.

Q. In 1927, your representation to Congress was 31,028.45, was it not?

A. That, of course, shows it in the book.

Q. Well, that's what you represented to Congress, wasn't it? That's my question. [1318]

A. What we represented to Congress?

Q. Yes. This was filed with Congress, wasn't it?

A. Yes, that's what we represented.

Q. You meant to stand on those figures to them, didn't you? A. Correct.

Q. All right. 1928, you represented to Congress that the tonnage was 35,028.89, is that correct? Did you? A. Where on the sheet is that?

(Testimony of Stafford L. Austin.)

Q. It was filed in Congress, wasn't it?

Mr. Vitousek: What was that figure?

Mr. Rathbun: 35,028.89.

Q. Now, you stopped in '28. Now, in '29 your claim to Congress shows 32,128 tons, is that right?

A. That's right.

Q. In 1930 it shows 31,720.1?

A. That's right.

Q. In '31 it shows 29,748.55?

A. Correct.

Q. In '32 it shows 31,283.95—correct?

A. Correct.

Q. In '33 it shows 30,008.55—correct?

A. Correct.

Q. In '34 it shows 23,168.37—correct?

A. Correct. [1319]

Q. In '35 it shows 26,357.99?

A. Correct.

Q. In '36 it shows 27,296.3?

A. That's correct.

Q. In '37 it shows 27,640.35?

A. Yes.

Q. In '38 it shows 25,559.70?

A. That's right.

Q. In '39 it shows 26,260.75?

A. Correct.

Q. In 1940 it shows 24,784.6?

A. Correct.

Q. In '41 it shows 24,088.25?

A. Yes.

Q. In '42 it shows 16,329.24?

A. Right.

(Testimony of Stafford L. Austin.)

Q. In '43 it shows 20,525.15?

A. Correct.

Q. And in '44 it shows 13,689.3?

A. Correct.

Q. Now, in the same manner that you answered as to the tonnage up to 1928 what do your figures show that you have testified about in relation to those and in relation to the ones after '28? For these different years.

A. For these different years? The Judge has them. [1320]

Q. Well, from your book, the same as you gave them in '28? A. Thirty-four.

Q. Let's take '29. A. 31,912.99.

Q. That's different than it was represented to Congress, isn't it?

A. Yes, it's not the same.

Q. And in 1930? A. 31,475.62.

Q. That's a different figure, is it, than in the claim to Congress? And '31?

A. 29,691.63.

Q. And that's a different figure than in the claim to Congress, is it not? A. It is.

Q. And '32? A. 31,046.25.

Q. And that's a different figure than the claim to Congress—right? A. That's right.

Q. Thirty-three? A. 30,008.55.

Q. That's the same. 1934? A. 23,168.37.

Q. Thirty-five? A. 26,357.99.

Q. Now, that isn't '36, that's '35?

The Court: For the year 1935 the figure again is?

A. 26,357.99.

(Testimony of Stafford L. Austin.)

Q. Now '36? A. 27,296.30.

Q. And '37? A. 27,640.35.

Q. Thirty-eight? A. 25,559.70.

Q. Thirty-nine? A. 26,219.66.

Q. That's a different figure than the claim to Congress, isn't it? A. Nineteen what?

Q. 1939. A. Yes.

Q. 1940. A. 24,743.67.

Q. That's a different figure, is it?

A. Yes.

Q. Forty-one? A. 24,088.25.

Q. Forty-two? [1322] A. 16,329.24.

Q. Forty-three? A. 25,025.15.

Q. And '44? A. 13,689.

(Discussion off the record)

The Court: All right. We'll take a recess now.

(A short recess was taken at 10:08 a.m.)

After Recess

By Mr. Rathbun:

Q. Mr. Austin, in the replies to these questions as to the sugar produced from plantation grown cane, you have been using a book in your hands that you have figures on? A. Correct.

Q. Of some kind. I have been showing you exhibits attached to the plantation claim with Congress, haven't I? A. Correct.

Q. You understood that, didn't you?

A. I did.

Q. Now, there are some differences in your figures and these Congressional claim figures, aren't there?

(Testimony of Stafford L. Austin.)

A. On the first figures, but the total is all the same.

Q. But the figures I asked you about, there is a difference? A. There's a difference, yes.

Mr. Rathbun: Now, if your Honor please, I have no objection to the Court looking at it. We can't offer it in evidence at this time, of course. If they are willing to, they can put this in evidence and then we will have the claim in front of us.

Mr. Vitousek: If the Court please, I don't know when the rule prevents them from offering evidence in cross-examination when they are showing to the witness the difference between his figures to explain it. We are not going to offer in evidence something that the Government is producing in our case.

Mr. Rathbun: It's their document.

The Court: There is nothing for me to rule on.

Mr. Rathbun: Well, I am perfectly willing to do it and perfectly willing to put it in evidence. If the Court rules that it is proper for me at this time to do it, I will do it. Then your Honor can have this and look at it as we go through it.

The Court: Are you making an offer of it?

Mr. Rathbun: I will, yes, your Honor.

The Court: Of the whole document?

Mr. Rathbun: The whole document as it was filed in Congress.

The Court: Now that the document is offered by the Government, what is your position? [1324]

Mr. Vitousek: If the Court please, we think it ought to be first identified with the witness. He is

(Testimony of Stafford L. Austin.)

showing him only one exhibit. If they are offering it, it's got to be proved in some way.

Mr. Rathbun: Certainly. Will you look at it, Mr. Austin?

Mr. Vitousek: I don't want to have any misapprehension here. This document was changed, as I understand it, before it was filed before the committee, and I just state that to counsel because we will have to show that this is not the correct document. It has been changed.

Mr. Rathbun: This was filed, wasn't it, with the Congress?

Mr. Vitousek: There was a document filed. I don't believe it's this one. I am informed by Mr. Kay that this is not. There were amendments made to it.

Mr. Rathbun: You mean this wasn't filed?

Mr. Vitousek: This particular document, no.

Mr. Rathbun: Was never filed?

Mr. Vitousek: If the Court please, I didn't have anything to do with the case. Mr. Kay says it was amended before it was filed. That's the statement I am making. I can't say because I wasn't in the case to handle that claim. Mr. Kay informs me that there were changes made in it. Now, if it is offered, I'll have to go into that first. If counsel wants to save the time of the Court, I'll be glad to go through this [1325] and see if it is the same, and then we can decide whether we will object to it or not. But otherwise we will have to—this witness did not prepare it and he is still testifying.

(Testimony of Stafford L. Austin.)

Mr. Rathbun: If Mr. Kay is sitting in the court-room—I don't know whether this should go in the record or not—we can facilitate this. That's all.

The Court: Go ahead.

Mr. Rathbun: What I'd like to know is whether or not that document was filed and then if you did file any amendment it was filed after that was filed? But this was filed with Congress?

Mr. Vitousek: If the Court please, may I have a moment? If the Court please, Mr. Austin has testified that he did not prepare this document, and I would suggest that it be marked but not received because we object to it being received at this time as a whole except that portion which he has testified to, as he did not prepare the document according to his own testimony. I don't know whether this is the one that was filed or not until we check it, and apparently no one here actually handled it. It was handled by Mr. Courtney, an attorney in Washington. I'd have to check it with the copy that we have, as obviously there are some changes because they note them on this; that this witness has already testified he didn't prepare the document. So we think it is improper to be received in evidence.

Mr. Rathbun: I can't force any other action on it than that. But to help straighten the Court out I am willing to have that marked for identification, then, that sheet that I was asking those questions from, table No. 1, in connection with the letter of Mr. Schmutz which refers to all of these exhibits, including table 1. He was the appraiser. He ad-

(Testimony of Stafford L. Austin.)

dresses a letter to the Honolulu Plantation Company under date of March 28, 1945.

The Court: Does that have a page?

Mr. Rathbun: It hasn't a page number. But his material starts with page 1 thereafter and goes right straight through and he refers to these exhibits. There is no secret about it, Judge. Take a look at it. (Showing book referred to to the Court) As far as I am concerned, there isn't any secret about it.

The Court: Well, at the moment the only thing that can come in apparently is this table 1, to show the figures from which you read.

Mr. Rathbun: Well, I did ask questions about other things way back in the cross-examination on that, in other tables. That's the one that we were at this morning.

The Court: Yes. That's table 1 in this Congressional claim, and it may be marked.

Mr. Rathbun: For identification?

The Court: For identification. [1327]

The Clerk: That's Government's Exhibit 1 for identification.

(Document referred to was marked "Government's Exhibit 1 for identification.")

Mr. Rathbun: Now, this is in my custody now. I don't know whether—

The Court: We'll hold you responsible for it, if you want to use it further.

Mr. Rathbun: If somebody accuses me of making changes on it—

(Testimony of Stafford L. Austin.)

Mr. Vitousek: We won't accuse him.

The Court: I don't think anyone will accuse you of anything like that.

Mr. Rathbun: We can make a copy of it or put it in as it is.

The Court: All right. But no one will suspect you of making any changes.

Mr. Rathbun: Having a document in evidence in your custody, and if something comes up on it—

The Court: Well, it isn't in evidence but it is marked for identification.

Mr. Rathbun: It is marked for identification, however. Does that straighten your Honor out on what you asked about?

The Court. All right. The theses are now straightened out. [1328]

Mr. Rathbun: All right.

The Court: That's all I wanted to do before.

Mr. Rathbun: I thought it was plain to the Court.

The Court: You get so wrapped up in what you are doing that you forget sometimes that there are confusing points to others, and I simply wanted to straighten it out.

Mr. Rathbun: I had my mind on my point. I knew he was using something other than this and I wanted to show the discrepancy. That's all.

The Court: Well, don't argue with me all over again. I was just trying to see what I wanted.

Mr. Vitousek: Is that all?

Mr. Rathbun: That's all.

(Testimony of Stafford L. Austin.)

Re-redirect Examination

By Mr. Vitousek:

Q. Mr. Austin, you testified in regard to tonnage from the figures that you had in the book that you carried with you. Can you state the nature of that book, what, how it was made up by you, and what you use it for or used it for?

A. It was a personal little black book that has all kinds of dope in it about plantation and various figures that I like to keep, I have always liked to keep in touch with.

Q. Did you use that in your work as manager?

A. In my work as manager.

Q. And in your present work? [1329]

A. It is.

Q. Now, there's been marked here for identification what is known as table 1, headed "Historical Date". I guess this must be wrong, too. It should be "data". "1908-1944, Honolulu Plantation Company." Now, during the recess I asked you to check totals. You said that the totals were the same. What do you refer to as the totals?

A. Total tons of sugar, refined sugar produced by the factory.

Q. And what did those totals include?

A. Tons of refined sugar from outside cane, tons of sugar from outside raws, and tons of sugar purchased from cane grown by the plantation.

(Mr. Vitousek shows a small book to Mr. Rathbun)

(Testimony of Stafford L. Austin.)

Q. Now, Mr. Austin, I hand you here what is headed "1928, Thirtieth Annual Report of Honolulu Plantation Company, for the year ending December 31, 1928." Is that a printed publication put out by the company? A. It is.

Q. Put out annually? A. It is.

Q. What in general does it show?

A. The manager's report and then the financial statement in the end, and crop data of various kinds, weather data.

Q. Well, now, turn to page 12. What is the information [1330] shown on page 12?

A. Yield per acre, plantation and outside cane.

Q. And outside cane. Now, does that show the total yield of refined sugar from cane grown by the plantation on plantation controlled land?

A. It shows the refined sugar, total for the plantation.

Q. Yes. Now, what is that figure?

A. 34,653.17.

Q. All right. What does your black book show?

A. That's 1928; 34,650.17.

Q. That's identical? A. Yes.

Mr. Rathbun: What was that last figure, please?  
(The reporter read the last answer)

The Witness: Seventeen.

Q. Now, Mr. Austin, does that show sugar produced from cane grown on fields under the control of the others? A. It does.

Q. And what is that figure? I am referring still to the 1928 annual report.

(Testimony of Stafford L. Austin.)

A. There is 161.90 plus—161.90 and plus 384.21.

Q. What owners was the cane purchased from from which this amount of refined sugar was manufactured? Does that show it?

A. It shows Sing Chong, McCandless and Pineapple Company [1331] cane.

Q. Can you state to the Court how this cane was grown, harvested, by whom, on these three ownerships?

A. The cane was harvested by the Honolulu Plantation Company and was—and the company helped in the cultivation and preparation of the cane during the growing period.

Q. All right, now, that same period, in that same period did you purchase any raw sugar as shown by the Plantation Company's annual report, 1928?

A. Three hundred seventy-five—

Q. No, you read from the report.

A. 375.72 tons of Waialua raws were purchased from the Waialua Sugar Company.

Q. All right, now. A. Outside raws.

Q. Now, what does your record show, your little black book that you have been reading from?

A. 375.72 tons.

Q. Does that check? A. That checks.

Q. Now, turning to the table 1 handed you, which is now Government's Exhibit 1—

The Court: For identification.

Mr. Vitousek: Does that have numbers or letters?

(Testimony of Stafford L. Austin.)

The Clerk: That's changed; we take the alphabet. [1332]

Q. Turn to the same year, 1928, now, what is the total of all sugar refined as shown on this exhibit?  
A. 35,555.00.

Q. What is the total shown on the annual report I handed you, for 1928?  
A. 35,555.00.

Q. For that same year what is the total shown on Government Exhibit 1 for identification of outside raw purchases?  
A. 526.11.

Q. How would that—using the annual report can you tell what figures made that up?

A. They have taken the outside cane and added it into it to make the raw sugar purchases, and the raw sugar purchases should have been 375.72 tons instead of the 526.11.

Q. The total, the grand total?  
A. Correct.

Q. But there have been various segregations of the outside cane and outside raws?

A. That's right.

Q. All right. (Showing some books to Mr. Rathbun)

Mr. Vitousek: What I was suggesting to counsel, if the Court please, is that rather than go through each one of these, since these are being introduced in evidence—he said he would prefer to look at them, which is natural—I'd like to state to the Court that I intended to offer them, introduce them in Mr. Spalding's testimony, and he was called to the coast in [1333] connection with this

(Testimony of Stafford L. Austin.)

plantation and he isn't here just at this time, and it would save an awful lot of time because we can take it up in argument if it is important.

Mr. Rathbun: I have no objection to marking them for identification, and let me look at them.

Mr. Vitousek: Very well. I'd like to have them all marked, 1924 down to and including 1943.

The Court: Annual reports of the company?

Mr. Vitousek: That's right.

Mr. Rathbun: From what year to what year?

Mr. Vitousek: 1924 to 1943 inclusive.

The Court: They may be marked for identification.

The Clerk: Honolulu Plantation Company Exhibit "A" for identification.

(The documents referred to were marked "Honolulu Plantation Company Exhibit A for identification.")

Mr. Rathbun: With the understanding, Judge, that this is for convenience, and I am not admitting anything on any grounds.

The Court: That's right.

Mr. Driver: Mr. Vitousek, would you mind telling us the purpose of the offer of that?

Mr. Vitousek: Well, are you familiar with this type of report? I might state to the Court that they are made up of two parts, one the manager's report, and the other is the [1334] financial statement taken from the books. The financial statement, I think, would be admissible on proper proof and

(Testimony of Stafford L. Austin.)

summation of the records of the books. But the purpose will be to make available for any witness to refer to who may be testifying, particularly now as to Mr. Austin, to show the manner in which the refined cane, refined sugar, was manufactured from plantation controlled land, from cane secured from other lands, and from raw sugar purchased, to substantiate the figures that he's given. It's quite obvious from his testimony that whoever made up these schedules—

The Court: You are getting in the same situation.

Mr. Vitousek: That's right.

The Court: "These schedules" meaning the Congressional claim, which is Government's Exhibit 1 for identification?

Mr. Vitousek: Yes. Mr. Austin testified to the totals shown on Government's Exhibit 1 for identification, and it corresponds with the totals shown in the report. I have one other question.

Q. Mr. Austin, the figures shown in your black book that you read to the Court, isn't that known as the manager's handbook? A. That is.

Q. Does that correspond to the figures shown in the annual report? A. It does. [1335]

By Mr. Driver:

Q. Did you get the figures from the **annual report**? Is that where you got the figures that are in your black book? A. Yes, sir.

Q. Well, it's not surprising that they correspond, is it?

(Testimony of Stafford L. Austin.)

A. I wouldn't think it would be surprising.

By Mr. Vitousek:

Q. I will ask one other question. In making up the report, it is not made up from the figures the manager compiles?

A. I beg your pardon? No, not made up of the figures that the manager compiles.

Q. Who compiles them?

A. The office manager.

Q. At the plantation? A. The plantation.

Q. Well, then, they come directly from the plantation? A. From the plantation.

Q. And where do your figures come from?

A. Directly from the plantation.

Q. So they are both from the same source?

A. That's right.

Mr. Vitousek: If the Court please, in order to go ahead in this matter, I would like the privilege of Mr. Austin being withdrawn until the Government has an opportunity to look over [1336] these reports, and we have another witness. We can go ahead with another witness at this time.

The Court: Very well. If he is recalled, it is only in connection with the annual reports?

Mr. Vitousek: That's right, in connection with the annual reports and possibly with the tonnage shown on this exhibit for identification of the Government, Exhibit 1.

The Court: Very well.

(Witness excused)

Mr. Vitousek: I'd like to call Mr. Schmutz.

GEORGE L. SCHMUTZ,

a witness in behalf of the Defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Vitousek:

Q. Would you give your name in full, please?

A. George L. Schmutz; that's spelled S-c-h-m-u-t-z.

Q. Where is your home, Mr. Schmutz?

A. Los Angeles, in the North Hollywood section of Los Angeles.

Q. What is your occupation?

A. I am a licensed real estate broker and appraiser.

Q. How long have you been engaged in such occupation?

A. Continually since 1922, with my headquarters in Los Angeles.

Q. What has been your general experience in making appraisals?

A. I have had occasion to make appraisals in various parts of California, Texas, Louisiana, New York, Massachusetts, Michigan and in other states.

Q. And would you give us the names of some people by whom you have been employed? In making appraisals.

A. I have worked for several agencies of the United States, namely, the Navy Department, the Army Department, the Justice Department, the Defense Plants Corporation, the Reconstruction Finance Corporation, the Department of the Interior,

(Testimony of George L. Schmutz.)

and the Federal Home Loan Bank. I have also made appraisals for the State of California through its Department of Finance, Department of Public Works, and the Building and Loan Commissioner. I have also had occasion to make appraisals for various municipal corporations, some of which are the cities of Los Angeles, Beverly Hills, Glendale, Burbank, Long Beach, Culver City, Southgate, and others. I have also been employed by and have made appraisals for various corporations, some of which are the Standard Oil Company of California; the Southern California Edison Company; the Santa Fe Railway Company; California Bank, Title, Insurance and Trust Company; Hearst Magazines, Incorporated; Metropolitan Life Insurance Company; Los Angeles Turf Club; Will Rogers Trust; and others.

Q. Would you give the nature of your work in making some of these appraisals?

A. I have made appraisals, made an appraisal of the valuation of water rights and cattle ranches in and along the San Joaquin River in Central California, involving approximately a hundred thousand acres. This assignment was made for the Lands Division of the Department of Justice acting as attorneys for the United States Bureau of Reclamation. I made an appraisal of approximately ten thousand acres of sugar beet land and other crop land in the basin near Riverside, California, for the Orange County Flood Control District. I made an appraisal of approximately two hundred

(Testimony of George L. Schmutz.)

fifty thousand acres [1339] of water-bearing crop, rain and desert land in the Owens Valley, situated between the Yosemite National Park and Death Valley, for the Department of Water and Power of the City of Los Angeles. I made an evaluation of several thousand acres of sugar beet and lima beet land in Orange County for the Navy Department. I made an evaluation of some land of the American Sugar Beet Company near Chino, in Riverside and San Bernardino Counties. I made an appraisal of the Ford Motor Company assembly plant at Los Angeles Harbor. Also an appraisal of the Jones Brass Foundry in Los Angeles. Also of the enterprise of Gaffers and Sattler Stove Factory in Los Angeles. Also the Grosse-Ile Airport in the Detroit River. Also the Los Angeles Shipbuilding and Dry Dock Corporation plant and facilities at Los Angeles Harbor, for the Navy. Also the valuation of various industrial lands in Los Angeles, San Francisco, San Diego, and Hoboken, New York.

I organized the appraisal department for the Home Owners Loan Corporation in California in 1933, under appointment by the Federal Home Loan Bank Board of Washington.

Q. What previous experience did you have?

A. I was one time irrigation engineer for Miller and Lux, Incorporated, in the development of an irrigation project in the Central Valley of California. I was one time construction engineer for Imperial Water Company No. 3, in the Imperial Valley, California. I was one time city engineer

(Testimony of George L. Schmutz.)

of Douglas, [1340] Arizona. I was one time efficiency engineer at the Pilares Mine of the Phelps-Dodge Corporation in Mexico. I was one time the chief engineer of the Hilltop Metal and Mining Company in Arizona.

Q. Do you belong to any professional societies and associations? If so, give their names.

A. Yes, I am and for some years have been a member of the Los Angeles Realty Board and was chairman of its appraisal committee in the year 1937. I am also a member of the California Real Estate Association and was chairman of its appraisal division in 1934. I am also a member of the National Association of Real Estate Boards. I am also a member of the American Institute of Real Estate Appraisers. I was chairman of its education and research committee in 1938, president in 1940, and member of the governing council since.

Q. Have you given any courses or lectures in connection with the work of appraiser?

A. I have.

Q. Would you give them, please?

A. I have lectured on economics and valuation subjects at summer schools at various institutions, some of which are the University of Southern California, the University of Chicago, the University of Pennsylvania, the University of Pittsburgh, the University of Michigan, Yale University, Tulsa University, Denver University, Houston University, Toulane [1341] University, and Columbia University. Also I have lectured in short courses spon-

(Testimony of George L. Schmutz.)

sored by the following real estate boards: the Los Angeles Real Estate Board, San Diego Real Estate Board, San Francisco Real Estate Board, Portland, Oregon Real Estate Board, and the Honolulu Real Estate Board.

Q. Have you published any books or written any books in connection with appraisal work? If so, give the subjects.

A. Yes, I am the author of a book entitled "The Condemnation Appraiser's Handbook." Also another book entitled "The Appraisal Process." Also a pamphlet entitled "Interest Tables and Their Uses."

Mr. Vitousek: If the Court please, it's about time for recess and we will now start in on the main evidence, if the Court desires a recess at this time.

The Court: All right. We will take a brief recess of five minutes.

(A short recess was taken at 11:00 a.m.)

After Recess

By Mr. Vitousek:

Q. Mr. Schmutz, are you acquainted with the properties on the Island of Oahu of the Honolulu Plantation Company?      A. I am.

Q. When did you first become acquainted with the Honolulu Plantation Company?

A. In December, 1940. [1342]

Q. When did you first see the properties?

A. That same month.

(Testimony of George L. Schmutz.)

Q. And have you made a study of the properties of the Honolulu Plantation Company?

A. I have.

Q. Have you made a study for the purpose of forming an opinion relative to the value of the properties involved in this particular case?

A. I have.

Q. You understand this is a consolidation of several cases?      A. I do.

Q. And does your answer relate to the consolidated proceeding?      A. It does.

Q. Without giving your opinion, have you arrived at such an opinion?      A. I have.

Q. What did you take into consideration in forming your opinion?

A. Some of the matters which I took into consideration before forming an opinion—

Mr. Rathbun: Just a moment, please. I object to that question, what he took into consideration. There's no opinion been given yet, and the question doesn't enlighten us at all [1343] on what the opinion is about, what it covers.

Mr. Vitousek: Well, if the Court please, this is preliminary. Any of the authorities hold that first you have to show what consideration the witness took in consideration in arriving at the value of the property.

The Court: It is usual to do it the other way around, to have the witness state his opinion and then state his reasons.

Mr. Vitousek: Quite frequently they do it that

(Testimony of George L. Schmutz.)

way, but unfortunately — I mean there are fine authorities both ways, if the Court please.

The Court: He has formed an opinion apparently, for he states that after the study he made he has an opinion. But on what subject, I don't know. And I think that might be significant in connection with the things that he took into consideration. I don't think there is any hard and fast rule as to whether the reasons could be given first or secondly. So on that score I will overrule the objection.

Mr. Rathbun: I am not objecting to that score.

The Court: You are not?

Mr. Rathbun: No.

The Court: On the point of what these considerations will relate to, what sort of an opinion, I am in the dark, and I think the objection is good on that ground. Without perhaps being required at this time to give a figure, I would like to [1344] know the nature of the opinion. You can give it a temporary label for the moment perhaps to clarify it.

By Mr. Vitousek:

Q. Mr. Schmutz, have you arrived at an opinion, without giving the amount, of the properties of the Honolulu Plantation necessary for the operation of that plantation enterprise, excluding movable personal property, excluding growing crops. which opinion is of the value of the property before and after the takings involved in this suit?

A. I have.

(Testimony of George L. Schmutz.)

Q. State to the Court the consideration of the matters, facts and things you took into consideration in arriving at it?

Mr. Rathbun: Just a minute.

Mr. Vitousek: I'd like to withdraw that question and reframe it.

The Court: The question is withdrawn.

Q. Will you give the consideration, your considerations in arriving at that figure?

Mr. Rathbun: If your Honor please, we object to the question stated. If he means to do it, he has limited the opinion to the property of the Honolulu Plantation Company necessary for the operation of the plantation enterprise; if they are limiting it to that, O.K., but I believe he means the whole property regardless of whether it is necessary or whether [1345] it isn't. We ought to have an understanding on that. It might cover a multitude of sins, and there may be a great difference of opinion as to what is necessary.

The Court: Is it the same type of thing that you put to Mr. Austin?

Mr. Vitousek: Yes, if the Court please.

The Court: Same identical question?

Mr. Vitousek: Yes. In order that there be no question on it, I will withdraw both questions and may they be stricken.

The Court: All right.

Q. Mr. Schmutz, have you arrived at an opinion as to the value, both before and after the takings involved in the consolidated proceedings now on

(Testimony of George L. Schmutz.)

trial of all of the property of the Honolulu Plantation Company that formed the sugar plantation enterprise conducted by it on the Island of Oahu at Aiea, near Pearl Harbor, excluding all movable personal property and excluding growing crops?

A. I have.

Q. In arriving at that opinion what did you take into consideration?

A. My general considerations were these, that prior to the time of the takings and for some years prior to that, the Honolulu Plantation Company was an integrated enterprise engaged in a perfected synchronization of an agricultural and an industrial productive activity, grew sugar cane which it [1346] processed into raw sugar, which was further processed into refined sugar.

The Court: Just a minute. Are you reading something?

The Witness: I am using some notes to refresh my memory, your Honor.

The Court: All right. Go a little bit slower with all those large words. We are making notes on this. Will you go over that again?

The Witness: Yes, sir.

A. (Continuing): That for some years prior to the taking the Honolulu Plantation Company was an integrated enterprise engaged in a perfected synchronization of an agricultural and an industrial productive activity. It grew sugar cane which it processed into raw sugar, and which was further processed into refined sugar. I took into con-

(Testimony of George L. Schmutz.)

sideration the amount of dividends which had been distributed to its shareholders, going back to 1908, and with a special reference back to the year 1924. I took into consideration the fact that in 1936 the company renewed or extended most of its major leases to the year 1965, and in one light became a new enterprise. I took into consideration the amount of money which this company spent in additional capital improvement and betterments in the three years immediately following the renewal of the leases. I also took into consideration the fact that in June of 1939 there commenced a series of takings in which cane lands were [1347] lost to the United States and to others, and that such losses continued up to the time of the first taking involved in this consolidated action, and including the lands lost which are involved in this action. I also took into consideration that following the first takings in 1939 the company was able to make their replacements of cane-growing areas at higher elevations. Those generally are the—I also took into consideration the book value of the company at various times, in addition to the fact that these book values were set up at cost as of 1932. I also took into consideration the earnings of the property during the years prior to the takings. These, briefly, are some of the matters which I took into consideration before forming my opinion of value.

Q. Did you visit the plantation properties?

A. I did.

Q. More than once?

(Testimony of George L. Schmutz.)

A. The first time I visited the property was in December, 1940. The last time I visited the property was in November, 1946. I did not visit the property in between.

Q. On or about June 20, 21, 1944—I'll withdraw that question. Did you make any investigations to find out if the plantation properties about which you are to testify, about which you formed the value, were being sold in the Territory of Hawaii? A. I did make an investigation. [1348]

Q. What was the result?

A. The result was, I was unable to learn of any sales of plantations.

Q. During the year 1944, your investigations relate to the year 1944 in connection with sales?

A. And prior.

Q. What was the situation of this Territory in the year 1944? A. We were still at war.

Q. Now, Mr. Schmutz, what was the fair value, as of June 21, 1944, that is, immediately prior to the filing of the first suit in these consolidated actions, of all of the properties of the Honolulu Plantation Company that formed that sugar plantation enterprise conducted by it on the Island of Oahu at Aiea, near Pearl Harbor, excluding all movable personal property and excluding growing crops?

Mr. Driver: Objected to.

Mr. Rathbun: We object, if your Honor please, for the reason that the questions show, and the answers of the witness show, that in arriving at

(Testimony of George L. Schmutz.)

the value as of June 21, 1944, he has taken into consideration productive activity of this perpetuated synchronization of the agricultural enterprise; he has taken into consideration the dividends that have been distributed to the shareholders; he has taken into consideration earnings on the property; he has taken into consideration [1349] lands taken previous to the lands involved in this proceeding, namely, in 1939. Those are not involved here. But he still considered them in his opinion. For those reasons, also the book value he has taken into consideration as of the date previous to these last takings. For those reasons we object. And also the usual situation that he should state that whatever opinion he has, having the leases in mind and that there were strikes and conditions.

Mr. Vitousek: Are those the only reasons for the objection?

Mr. Rathbun: Those are the reasons I stated.

Mr. Driver: They are enough.

Mr. Vitousek: If the Court please, those are reasons that may go to the weight of the witness' testimony, but since those reasons are technical rather than the main point what I felt was at issue, I'd like to withdraw that question and question the witness further on these points.

The Court: Very well.

By Mr. Vitousek:

Q. Mr. Schmutz, you have been in court during the trial of these proceedings, have you not?

A. I have.

(Testimony of George L. Schmutz.)

Q. And you saw introduced in evidence a series of leases?      A. I did.

Q. Leases executed by various owners to the plantation, [1350] of land used by it?

A. I have seen them.

Q. Have you examined them?

A. I have.

Q. And you said you have taken into consideration, you stated that you had considered that the company renewed or extended its leases?

A. I did.

Q. Were the leases you referred to were the ones you said you examined?      A. Yes, sir.

Q. Now, what considerations, if any, were given to the so-called book value?

A. It was just one of the many matters which an appraiser, which I as an appraiser took into consideration before forming my opinion.

Q. What do book values represent in a case of the Honolulu Plantation Company?

A. They represent the amounts that were, the amounts at which the items are carried on the books, based upon the cost as set up in 1932, less depreciations accrued year by year, plus additions to capital in the meantime.

Q. Now, you stated you took into consideration the takings of plantation lands or the right of the plantation to use land prior to the takings involved in this suit. What [1351] consideration did you give to that?

A. That was one of the matters which I took

(Testimony of George L. Schmutz.)

into consideration before forming an opinion as to the probable value of the property after those takings and immediately prior to the time of the first taking in this action, or we'll say June 21, 1944. As a matter of fact, before forming an opinion of the value of the property as of any date, I am interested in knowing something of the history which went on before.

Q. Well, in giving this value, is there included in any way a loss that might have been suffered by the plantation, if any, in the prior cases?

A. There is not.

Q. What consideration did you give to the fact that land had been, that area had been replaced from time to time by taking other land into cultivation, areas that had previously been taken?

A. The replacement of land previously lost tends to reestablish the company in the position in which it previously had been, because of the replacement of those lands. The extent of the weight given to the consideration, I am unable to say. I will say this, however, that my opinion of value is not predicated upon any one set of figures or conditions, but it is taking into consideration all of the matters which I believe to be pertinent as affecting the value of the property. [1352]

Q. Did you understand that you were valuing property or rights to property and not the company as a whole?

A. Yes. By that I suppose you mean that I am not valuing the real estate for the reason that real

(Testimony of George L. Schmutz.)

estate can't have value. But what we do when we make an appraisal is to value the rights of use of the real estate. In other words, we value the rights rather than the things to which the rights are attached.

Q. Well, what I had reference to was, you were not attempting to value stock or value the plantation company as a whole but rather the properties involved in these takings?

A. The real estate, irrespective of ownership.

Mr. Vitousek: Now, if the Court please, we renew the question.

Mr. Rathbun: We renew our objection, on the same grounds.

Mr. Vitousek: If the Court please, this falls into the same type of question as was given before, and considerations are those considerations which one would naturally give, as shown by the decisions. First, the fact that it had been a profitable enterprise prior to the takings, not that you took into consideration and capitalized the profit but that it had been successful. Certainly that is something to consider in valuing properties. The fact that the size of the plantation is affected by the prior takings relates to history, and it is the same type of evidence as given by Mr. Austin. In other [1353] words, we could not claim in this case, nor are we attempting to claim in this case, depreciation, if any there occurred or pretending there was, due to the properties, due to the takings not involved in this case. Therefore, a person in studying the history of the plantation, the fact that the original had a 30, or I believe up to a 35 ton producing mill,

(Testimony of George L. Schmutz.)

after those takings involved in the prior cases it went down to a 21 thousand ton producing plantation, that is, from canes grown and controlled by it, is a matter of history. In order to value it as of the time in 21 and down to 15, naturally those matters are considered as to whether they entered into the valuation in the matter of dollars and cents in making a computation. The witness has said he did not consider them as history; those are all matters that anyone trying to value the plantation, in this particular instance shown that in 1944 there was no market—it's almost a matter that the Court could take judicial knowledge of. The United States was at war and Hawaii in the center of it. So it is necessary to get to a fair value. All those various factors are all factors that courts have said before are matters to be considered. But what is distinguishable and what we are not trying to claim here in any sense is the so-called loss of business. What we are doing is to confine this to property.

Now, as shown in the General Motors case, there is a difference between possibly property and — between property [1354] in the ordinary sense and a right to use property. But it was held that that was a property that should be considered in a condemnation case where a leasehold was directly involved. And here leaseholds are directly involved. All those matters are matters in which anyone appraising a property, to arrive at the value of the property must take into consideration. They cannot say that they made so much money, therefore we

(Testimony of George L. Schmutz.)

will capitalize that at a certain rate, and that's the value. No, that's what the courts say cannot be done. But that it is successful or has been successful in the history of the past, certainly anyone going out there to purchase it—and that's what we must put ourselves in the frame of mind, of an alleged purchaser for cash, if we are taking into consideration market value. And certainly if we are taking the fair value, those are the same matters you would consider, would want to know, whether the enterprise in the past had been successful. Now, when it comes to what he pays for it, that's up to capital investment at that time. But as to what the owner placed his original cost less depreciation, it is also something to be considered. And that is the so-called book value which was established, he says, as of 1932. That's what the owner sets up as a value at that time, and since then depreciated, or how they arrived at it we don't know. But that is something a purchaser would consider also as to the weight any one of these items were given. I submit that is a matter for further [1355] questioning or cross-examination. But they are all proper matters to have in mind, and that's all it amounts to for a person to have in mind when they are placing a fair value on property.

The Court: I am going to overrule the objection. You may have an exception to this and the line. (To the witness) Do you wish the question read to you?

The Witness: Yes, I wish it would be read, please.

(Testimony of George L. Schmutz.)

(The reporter read the question referred to)

A. My answer is \$4,200,000.

Q. Mr. Schmutz, I will ask you if your opinion of the fair value of the same properties with the same exclusions after the takings involved in these proceedings—

Mr. Driver: Objected to.

Mr. Rathbun: On the same grounds.

Mr. Vitousek: Just a minute, if the Court please. I'd like to reframe that.

Mr. Rathbun: Again, to avoid constant repetitions, may we have our objection on this question of value all the way through?

The Court: He says he is going to reframe the question, so I think you had better wait a minute.

Q. Mr. Schmutz, I will ask you the same question as to fair value, the same property and with the same exclusions, after the takings involved in these proceedings, and assuming [1356] the takings were after the date I gave you, June 21, 1944?

Mr. Rathbun: We object upon the grounds that we objected to the other question.

The Court: Same ruling and a continuing exception to the line.

Mr. Driver: And now, with the Court's permission, may I give one further reason for the objection, and that is, that the witness has apparently included in his opinion value of testimony something for this integrated business enterprise that he speaks of?

The Court: That may be noted, and the ruling

(Testimony of George L. Schmutz.)

is the same and the exceptions relate to that point as well and continue.

A. The answer is \$3,113,000.

Q. Mr. Schmutz, in arriving at these opinions of value, will you state whether or not you included any value of profit or good will of a going concern? A. I did not.

Q. What was the total irrigated cane land area controlled by the Honolulu Plantation before the takings involved in these particular consolidated actions now on trial?

A. Four thousand two hundred eighty-three acres.

Q. And after the takings involved in these consolidated actions?

A. Three thousand one hundred ninety-six acres. That is irrigated cane land. There is an additional 114 acres in [1357] cane but it was dry farmed.

Q. Now, Mr. Schmutz, in connection with the answer you gave after the takings, I want to make an assumption and ask for your opinion. Assuming that instead of being the 1,087.59 acres taken, there was only 750 acres taken. In that event, what would be your opinion as to value of the properties described in my main question, with the exclusions that I referred to?

A. Three million four hundred fifty thousand dollars.

Q. How did you arrive at that?

A. Briefly a thousand dollars an acre.

Q. And that thousand applied to what character of land? A. Irrigated cane land.

(Testimony of George L. Schmutz.)

Q. Would you explain how you arrived at that figure of a thousand dollars an acre?

A. I took into consideration several matters. One of them was the evidence that I found in discussing the matter with people as regards to the common notion in the community regarding the investment in irrigated cane lands per acre, which was a thousand dollars an acre for plantations which did not have a refinery, whereas this particular property does. I also made a study indicating the amount of depreciation in the value of the property from 1939 on up until the present time, for the purpose of getting an over-all picture on shrinkage in the value occasioned by the taking of considerably more acres [1358] than are involved in this action, for the purpose of arriving at an indication of the amount of depreciation on the average which was suffered by reason of the loss of each acre, on the average. I also had occasion to make a study of a report prepared by a technician in this city of the damage caused by 580 acres of land taken in this particular plantation in some prior actions for the purpose of getting his views, his method of approach, and his conclusions. And as a consequence of these studies and investigations and computations, I came to the conclusion that the average value is about a thousand dollars per acre; for each acre that was lost, shrunk the value of the property, the physical property, at the rate of about a thousand dollars per acre.

Q. Well, would it be true the reverse, to add land, cane land, to the plantation?

(Testimony of George L. Schmutz.)

A. In a measure, yes, provided that the additional capital investment was made in additional water facilities, in additional ditches and canal to get water on to the land for irrigation, in addition to the milling facilities and the refining facilities to take care of the increased capacity from the increased cane land, and provided additional capital investments were made in housing for employees. I believe it would work both ways.

Q. You heard the testimony of Mr. Austin regarding the capacity of the mill, refinery, the mill and refinery, did you [1359] not? A. Yes, sir.

Q. Did you also make any check of the records regarding the output of the mill?

A. Yes, I had copies of the published annual reports of the company.

Q. As of the date of these takings the cane produced on the plantation would permit, that is, before the takings, as of the date but before the takings, permit what output of the mill?

A. As I recall, it was approximately 20,000 tons.

Q. And after the takings?

A. Approximately 15,000 tons.

Q. Would the fact as shown by such testimony and as shown by such evidence have anything to do with the value of the mill? If so, what?

A. In my opinion it would tend to depreciate the value of the mill because of the resulting overcapacity, and because of the further fact that there would be an increase in production costs, all of which would tend to put the mill in the position

(Testimony of George L. Schmutz.)

of being unable to earn a fair return upon its reasonable value.

Q. What is meant by capital investment?

A. Capital investment means the money invested in an [1360] enterprise.

Q. Well, assuming that a willing purchaser would have purchased this property after the takings for a figure you stated, as your opinion of value, \$3,113,000, had paid that, now, what would be the capital investment there?

A. Well, there are two capital investments. From the standpoint of the purchaser, the amount which he pays for a property is his capital investment, and at the same time it is entirely possible that the company which owns the property being sold may have a greater or even a lesser capital investment in the property.

Q. Well, does capital investment mean value?

A. No, it does not. Capital investment refers to cost in contradistinction to value.

Q. Value may be more or may be less?

A. That is true.

Q. You heard the testimony of Mr. Austin here in this case as of 1944 and that no lands were available to increase the cane area for this plantation?

A. I did.

Q. Did you give that any consideration?

A. I did.

Q. How?

A. If there had been land available for replacement of the cane-growing areas, in my opinion the damage would have [1361] been less.

(Testimony of George L. Schmutz.)

Q. You heard his testimony regarding the purchase of raws?      A. I did.

Q. Does that enter into your reasons at all for this value? If so, how?

A. Yes, if there would have been a free market for raws and raws could be purchased in the market to take the place of the plantation-grown raws, in my opinion the damage would have been less.

Q. Mr. Schmutz, Mr. Austin testified that you assisted in the preparation of a claim before Congress.      A. That is correct.

Q. Will you please tell this Court whether or not the claim for damages was included in that claim for the takings involved in what we term the first Hickam Field taking, which was Civil Case No. 289 in the Court's records here, filed June 2, 1935, judgment February 25, 1935?

Mr. Rathbun: I object to that. The claim speaks for itself. It is not for him to say what was in it.

Mr. Vitousek: The claim has not been before the Court and counsel read from the claim and asked Mr. Austin is it not true it was included in there, and reading from the claim itself, but didn't put it in evidence.

Mr. Rathbun: It was a very proper time to get it in there [1362] and have it identified.

Mr. Vitousek: It's identified—

Mr. Rathbun: One page only.

The Court: Well, it still remains true, doesn't it, that the claim speaks for itself? What you might think of it and what someone else might think of

(Testimony of George L. Schmutz.)

it is not as important as what the claim itself says.

Mr. Vitousek: Well, that is possibly true, if the Court please, but the man who prepared the claim can state whether or not this was included. I think it is a proper question.

The Court: I think the claim speaks for itself.

Mr. Vitousek: May we submit to the Court's ruling?

The Court: The objection is good, and you may have an exception.

Mr. Vitousek: Exception. This about concludes this, and it's about time for recess, and I would like to check.

The Court: All right, we'll take a brief recess.

(A short recess was taken at 12:00 noon.)

#### After Recess

The Court: Any further direct?

Mr. Vitousek: That's all of direct at this time.

The Court: Cross-examination?

Mr. Rathbun: We move, if your Honor please, to strike the testimony of the witness, upon the grounds stated in the objection to the two value questions. [1363]

The Court: Same ruling, same exception.

#### Cross Examination

By Mr. Rathbun:

Q. Mr. Schmutz, you pretty largely since 1922 have been confining yourself to making appraisals for people that paid you a fee, and testifying in court, haven't you?

A. That is true, particularly since 1928.

(Testimony of George L. Schmutz.)

Q. Yes. You were hired by the Honolulu Plantation Company in connection with something or other back in 1940?

A. I was not employed by them in 1940. I looked over the property and discussed the matter of pending actions with Mr. Phil Spalding, the president of the company. It was not until the spring or summer of 1944 when I was first employed.

Q. Did you come here to Honolulu to talk that over with Mr. Spalding?      A. In 1944?

Q. In 1940.

A. No, I did not come here for that purpose.

Q. Where did you see Mr. Spalding?

A. I had lunch with Mr. Spalding at the Young Hotel.

Q. Where?      A. In Honolulu.

Q. You came here, then?

A. I did. I was here.

Q. You were here? [1364]

A. Yes, I was here.

Q. For that purpose?

A. Not for that purpose.

Q. And is that all you had to do with it from 1940 until 1944?      A. That's right.

Q. Gave it no further thought?

A. That is true.

Q. Then what was the occasion of your connection with it in 1944?

A. For the purpose of making an appraisal to be included in the report to be submitted to Congress.

(Testimony of George L. Schmutz.)

Q. And in this proposed claim to Congress was this document that I now show you filed with the Congress of the United States? (Handing witness a paper-bound book)

A. I do not know whether it was filed or not.

Q. You collaborated in the making of that particular document, did you not?

A. I did. I prepared the section called "The Appraisal."

Q. And used the exhibits referred to in your so-called appraisal in there which are attached?

A. That is true.

Q. You don't know whether it was filed or not?

A. I do not.

Q. You made it up, whatever you did, for the purpose of [1365] having it filed?

A. That is correct.

Q. And you meant that the representations contained in there should be considered by the committee of Congress that this was submitted to, didn't you?

A. Say that again, please.

(The reporter read the last question.)

A. That is correct.

Q. So whether it was filed or not, that was your purpose in making these representations, wasn't it?

A. That is correct.

Q. You assumed it would be filed, did you not?

A. I understood that it was to be filed or to be presented.

Q. How long did you work on the preparation of that document, consultations, and so forth?

(Testimony of George L. Schmutz.)

A. Offhand I would say four to five weeks in San Francisco in the office of Honolulu Plantation Company.

Q. Four or five weeks? Was that daily, continually?

A. Yes; there were a few lapses in between when I went back to Los Angeles. But when I went to San Francisco, it was usually from one to two weeks at a time. So I would say that the total time would be probably four to five weeks.

Q. And in testifying in these cases like this one, where you are employed by people to give an opinion, do you [1366] have any rate that you charge per day or per hour or a week or what?

A. I have.

Q. What is your rate?

A. One hundred dollars per day and expenses.

Q. What did you charge the Honolulu Plantation Company for your services at this time that you had completed this claim that was gotten up for the purpose of filing it in Congress?

A. My fee was exactly the same throughout the entire work that I have done for Honolulu Plantation Company, on a per diem, one hundred dollars per day plus expenses.

Q. What has been your total fee up to the time that you took the witness stand here in this case?

A. I haven't the slightest idea.

Q. Can you estimate it for us?

A. It would be four to five weeks in the preparation of that, and I have been here since the morning of the 19th of November.

(Testimony of George L. Schmutz.)

Q. I said up to the time that you got here. That would be about how many days altogether that you put in there up to the time that you came here? A. Twenty to twenty-five days.

Q. So that your fee up to the time that you came here to the Honolulu Plantation Company was not exceeding twenty-five [1367] hundred dollars? A. I think that is right.

Q. That's all the remuneration that you had?

A. Plus expenses, of course.

Q. Plus expenses, travelling to Honolulu and back?

A. No, travel from Los Angeles to San Francisco and hotel bills in San Francisco.

Q. O.K. How much have you been paid on account of expenses?

A. I do not recall whatever they were.

Q. And what do you expect to charge for the time that you have been here?

A. At the same rate that I have just mentioned.

Q. Do you have further employment in mind in connection with this matter?

A. I have none.

Q. You haven't been advised or retained in any way in case any further proceedings are taken before the Congress of the United States?

A. That has not been discussed.

Q. Now, you say in connection with this opinion that you are testifying to here, on a before and after basis, that you considered the fact that this synchronized agricultural enterprise was a productive activity. What did you mean by that? [1368]

(Testimony of George L. Schmutz)

A. I meant that it is an enterprise in which there is production.

Q. Just a matter of production of sugar, is that it?

A. That is correct.

Q. And you also said that you considered the dividends distributed to the shareholders back as far as 1908, and especially up to the year 1924?

A. Not specially; since 1924.

Q. Since 1924?

A. Yes, sir.

Q. Well, was there any—why did you pick out 1924?

A. As I recall, that was because that was about 16 years prior to 1939, and the life of the leases have about 26 years yet to go. I was making a study of the indicated value based upon earnings of the 16 years prior to the time of what might be called the last normal operations before the war.

Q. Now, in considering the dividends distributed to the holders of the stock from 1908 on, what is your purpose in considering those?

A. For the purpose of getting the general idea as to whether there had been any regularity of the dividends and whether the property was considered a successful company.

Q. In other words, entering into the value that you gave was a consideration of the fact which you put on the credit side in your valuation that they had paid dividends [1369] that you considered ample, is that right?

A. I took into consideration the fact that they had paid dividends without giving it—that is a

(Testimony of George L. Schmutz )

qualitative statement without reference to quantity.

Mr. Vitousek: The witness should be permitted to finish his answer.

Mr. Rathbun: Were you through, Mr. Schmutz, with your answer?

The Witness: Yes, I think so.

A. To be sure that we understand each other, I did take into consideration for the purpose of forming a judgment whether it had been a successful enterprise.

Q. But you did take it into consideration in arriving at your opinion?

A. For whatever it was worth, I did.

Q. Yes. Supposing the report of the earnings that you took into consideration had shown a loss instead of earnings, would that have made any difference in your opinion of value?

A. Are you talking about dividends or what?

Q. Dividends, dividends.

A. I don't know how a dividend could be shown as a loss.

Q. Well, I probably confused the question. If it is shown that instead of paying dividends that they had lost money and then earned dividends, would that have made any difference in your opinion of value? [1370]

A. It would.

Q. You would have given it considerably less value, wouldn't you?

A. That is true.

Q. Would the fact that for several of the closely previous years to 1944 that they didn't earn sufficient money to pay any dividends to the stockholders have had any effect upon your opinion?

(Testimony of George L. Schmutz.)

A. I took that into consideration. There were two years to which you refer.

Q. You took that into consideration?

A. I did, sir.

Q. You didn't say that in answer to counsel's question, did you? You said you took into consideration the earnings only and the dividends paid.

A. And I also stated that I took in the net income available for interest on the investment before depreciation and after the payment of Federal and Territorial income taxes.

Q. What years was it that they had this shortage that you just mentioned?

A. 1939 and '40 were two years in which dividends were not paid.

Q. Do you know what the statement showed that year as to profit and losses?      A. Yes, I do.

Q. What did it show?

A. Before telling you this, I will have to tell you what—at the bottom of the statement there is shown the annual report, the amount.

Q. Please answer my question, if you can.

A. Well, I can't answer your question unless I tell you what I am going to tell you about.

Q. I asked a question. That's all I want.

A. It can't be answered.

Q. It can't be answered?      A. No, sir.

Q. You cannot answer that question?

A. I cannot answer that question without giving you an explanation of what the statement does actually show.

(Testimony of George L. Schmutz.)

Q. All right. That answers my question. You can't answer it. Do you know that in the year 1938 they showed a net loss of \$334,265.93?

A. That is not correct. These figures are in error. That's what I was trying to tell you.

Q. What figures are in error? We are using the word "these" again.

A. Every figure in this column on table number one, shown as net income available for interest on the investment—

Q. Yes?

A. —the annual reports are here and I can show them to [1372] you if you want to get the correct figures.

Q. Well, I'm going by this table number one, which has been—

A. Table number one is in error in that column.

Q. Identified as Government's Exhibit No. 1. This is the exhibit that you attached to your part of the claim that was submitted to Congress as an exhibit and referred to it, didn't you?

A. That is correct.

Q. And it was meant to be represented to the Congress as the true statement of the situation?

A. That is correct.

Q. In the year 1939 did they have a net loss of \$197,559.11?      A. They did not.

Q. That is incorrect also?

A. That's right.

Q. And what you said about the other item would apply to that? Your answers would be the same, would they?

(Testimony of George L. Schmutz.)

A. That's true for every figure in that column.

Q. Now, had there been a loss of \$334,265 in 1938 and \$197,559 in 1939, how much, if any, difference would it have made in the valuation that you have given here?

A. I am not prepared to give you any such figures.

Q. Can you figure it out? [1373]

A. No.

Q. You can't do that? A. No.

Q. Possibly? A. No.

Q. It was also represented to Congress through this table one, was it not, that in the year 1940 they had net income of \$175,334.81 available for interest on the investment? Another way of saying dividends, isn't it?

A. No, it isn't another way of saying dividends, but that is the figure in this table.

Q. All right. And no dividend was paid, was there? A. That is correct.

Q. Did you consider the fact that the reason it wasn't paid was because they had paid, they had had those losses in the previous few years and had to make them up?

Mr. Vitousek: If the Court please, I object to that question. What does he refer to? There has been no testimony in regard to losses.

The Court: Referring to losses reflected in table one of the Congressional claim for the years 1938 and '39.

Mr. Rathbun: That's what I am referring to in this table.

(Testimony of George L. Schmutz.)

Mr. Vitousek: Which the witness says is incorrect.

Mr. Rathbun: We'll go by this first and we'll find out about the incorrect part. [1374]

The Court: I think the question is clear. Do you have the question?

The Witness: May I have it?

(The reporter read the last question.)

A. No, I didn't know that those were the facts.

Q. You didn't know that what was the fact?

A. What you just stated, that they had the losses in the previous years and they were trying to make them up.

Q. You knew that table number one showed it as you filed it with Congress, as you prepared it?

A. Yes, sir, it was prepared in the office of the Honolulu Plantation Company in San Francisco through an error in instructions.

Q. Then you did know about it, didn't you?

A. I learned about it later.

Q. Didn't you learn about it when this was prepared for this claim?

A. No, sir, it was not until later after that that we discovered the difference.

Q. But you knew it was on this claim as I read it to you?

A. It was as it went in, but I didn't know whether it was right.

Q. You knew it was on this table, didn't you?

A. Yes, sir. [1375]

Q. **And you meant to have that filed in Con-**

(Testimony of George L. Schmutz.)

gress?      A. Yes, sir.

Q. In the year 1941 they show net income available for interest on the investment of \$187,140.46 and paid a dividend of one hundred fifty thousand. You knew that, did you?      A. I did.

Q. In 1942, two years before these takings in these cases, they had earnings, net income rather, available for interest on the investment of \$28,005.44. You knew that was on this table, did you?

A. Yes, and they paid dividends of one hundred fifty thousand that year.

Q. Well, now, I'll ask that. Did I ask you that?

A. No, I'm sorry.

Q. Will you please wait until I ask you a question and answer my question. They paid a dividend of \$150,000 that year, did they not?

A. That is correct.

Q. That had to come out of surplus, did it?

A. That's right. No, it didn't have to come out of surplus. According to this it did. But these weren't the facts.

Q. All right. The table one shows it would have had to come out of surplus?

A. That is correct if table one were correct.

Q. In the year 1943 they earned \$186,969.88 and paid a dividend of one hundred fifty thousand?

A. That is correct.

Q. And that was on this table, wasn't it?

A. That is correct.

Q. Now, assuming that the net income available for interest on the investment, beginning with the

(Testimony of George L. Schmutz.)

year 1938 down through and including the year 1943 was truly as I have read the figures to you appearing on table one, would that have affected your value or your valuation, your opinion of value that you have testified to in this case?

A. Yes, it would have been less.

Q. To what extent? A. I cannot tell you.

Q. You can't figure?

A. Well, I wouldn't rest my opinion upon any such computation anyway, Mr. Rathbun.

Q. You can't figure by figuring out in dollars and cents how much less it would make your opinion?

A. No, sir, not based upon this alone because I don't predicate my opinion—

Q. Well that's my question. Please. On the bottom of that table one, Government's Exhibit one for identification, under the word "averages", for 37 years the annual average net income available for interest on the investment was [1377] \$457,030.93. And the dividend paid annually averaged \$380,608.11. Is that correct as set forth on that table one? A. It is.

Q. From the year 1924 to the year 1939, a 16-year period, the average net income available for interest on the investment was \$312,433.65, and the annual amount paid in dividends over that 16-year period averaged was \$406,718.75. Is that correct? A. Yes, sir.

Q. Now, on the face of those figures, as to 1924 to 1939, it shows that they paid more dividends

(Testimony of George L. Schmutz.)

than they had earnings available for it, doesn't it?

A. That is correct.

Q. Now, that's what you call a successful company, is it, financially? A. It is.

Q. Now, you considered that in 1936 some leases were renewed or extended, most of them to the year 1965, is that what you said? A. Yes, sir.

Q. In arriving at your opinion of value in this case, you considered leases having been renewed previous to the leases which are involved in these takings here, is that right. A. That is right.

Q. Did you study the Honolulu Plantation lease which is [1370] in evidence here as Exhibit 9-K?

A. I read all of the leases but I don't recall that particular one.

Mr. Rathbun: All right. (To the Clerk) May I have that one?

The Clerk: That's the Damon Estate? Do you want Bishop or Damon?

Mr. Rathbun: No, Damon.

Q. Is that the lease that you studied, or have you studied it? (Handing document in evidence to the witness.) Exhibit 9-G.

A. I'm quite sure that I read this lease.

Q. Well, you should have read it in view of your testimony, shouldn't you?

A. No, not necessarily.

Q. Didn't you consider these leases?

A. I did consider the leases: and counsel told me, on the instruction of counsel I assumed that they had a lease. I'm not a lawyer and can't pass upon the validity of title.

(Testimony of George L. Schmutz.)

Q. All right, you assumed after you examined this lease, then, and based your opinion upon the information that you obtained, that that lease, which on its face expired on the 30th day of December, '43, I think—expired 15 years from the first day of January, 1929—you knew that, didn't you?

A. Yes, sir. But there were other documents in connection [1379] with that which I am informed formed a contract, an enforceable contract, by which the terms could be extended.

Q. And you accepted that statement?

A. I did.

Q. Assume that the advice that you had was incorrect, and that there was no renewal of that lease, that would have had an effect upon the opinion that you have given in this case, would it not?

A. It would have.

Q. Would it affect it downward or upward?

A. Downward.

Q. Can you figure out how much less than what you have testified to you would have given on that account?

A. At the rate of a thousand dollars an acre for each acre involved in that lease.

Q. And how many acres are involved in that lease?      A. I don't recall.

Q. Will you take this lease and tell me the acreage that you have in mind when you say you would decrease it at the rate of a thousand dollars an acre?

(Testimony of George L. Schmutz.)

A. Well, I would expect counsel to tell me the number of acres involved.

Q. I don't know what you'd expect counsel to tell. I want you to do it, please. (Handing document in evidence to the witness.) [1380]

Mr. Rathbun: When he gets through with that. I can't possibly finish today. Can we quit at that point?

Mr. Vitousek: I want to register an objection. This counsel is calling for this witness to answer a conclusion of law, what this lease covered in acreage. The exhibit in this case would show, if he wants to get the acreage.

The Court: I don't think the acreage itself is a matter of law. It is a matter of mathematical computation. The witness may answer the question, if he can. You may have an exception. May we have the question?

(The reporter read the last question.)

Mr. Vitousek: We submit the witness has testified regarding cane acreage, and it's been shown that the long lease involves other takings a long period back. We submit that the question can't be answered from that lease. It is a matter of law. That's the point we are making.

Mr. Rathbun: Any question of law to it, if your Honor please? This man considered that lease, he says. I want to know what he considered and how much and to what extent.

The Court: The witness may answer the question if he can.

(Testimony of George L. Schmutz.)

A. According to the lease there appears to be 1,451.66 acres involved. But of that I don't know how many were cane acres.

Q. Did you try to find out when you considered that [1381] lease for the purposes that you stated?

A. That information was furnished me by the Lands Department of C. Brewer and Company as to the number of acres involved; and as regards the status, the legal status of the lease, that information was furnished me by counsel.

Q. All right, then, how much would you take off, then, from your valuation because of the assumption that I put in my other questions?

A. Well, if all of these 14—well, I'd take off a thousand dollars per acre for each acre of cane land, whatever it was.

Q. Well, that would be over a million dollars, wouldn't it?

A. Assuming that those were all cane acres, and I am positive they weren't.

Q. Well, what percentage of them, if you are positive, there wasn't?

A. Well, I can't give you the figure now. I'll have to dig it out. It's in the evidence here, I'm sure.

Q. Never mind the evidence. I'm asking you.

A. I don't know.

Q. I'm testing your knowledge.

A. I don't know.

Mr. Rathbun: All right. May we stop there, Judge?

The Court: Yes, we'll adjourn at this time for the day, resuming tomorrow morning at 9:00 o'clock.

(The Court adjourned at 12:50 p.m.) [1382]

Honolulu, T. H, December 11, 1946

The Clerk: Civil 514, United States of America versus 257.654 acres of land, and Civil Nos. 521, 525, 527, 529, 532, 533, 535, 536, 540, 544, 548 and 684, for further trial.

The Court: Are the parties ready?

Mr. Vitousek: Ready, if your Honor please.

Mr. Rathbun: Ready.

The Court: You may proceed.

GEORGE L. SCHMUTZ,

a witness in behalf of the Defendants, having previously been sworn, resumed and testified further as follows:

Cross-Examination—(Continued)

By Mr. Rathbun:

Q. Mr. Schmutz, is that the way you pronounce your name? A. Yes, sir.

The Court: You are mindful of the fact that you are still under oath?

The Witness: Yes, sir.

The Court: You may proceed with the cross-examination.

Mr. Rathbun: Mr. Vitousek handed me last night the annual reports of the Honolulu Planta-

(Testimony of George L. Schmutz.)

tion Company, from 1924 to 1943 inclusive. We have examined them hastily last night and we object to—will your Honor look at one that is typical?—the [1383] printed matter in the beginning, which is a resume of what some officer, manager and vice-president, or some other person thinks about what the report shows, the report of the stockholders. That report we object to. As far as the figures are concerned, we have no objection. (Handing a small book to the Court.)

Mr. Vitousek: The Court will recall yesterday I stated that the printed matter I doubt if it will be evidence. The figures are taken, summaries from the books, and would be.

Mr. Rathbun: Well, just for the record I am making that objection. I am not insinuating that your Honor will be persuaded by reading it, but it should be in the record.

The Court: So as to all of these offered annual reports the only admissible parts are those pages which contain figures.

Mr. Rathbun: The report itself, in other words, the financial report.

The Court: Not anyone's opinion as to what it shows.

Mr. Rathbun: No statement by the officers.

The Court: Very well, with that understanding and with that limitation these documents may become an exhibit. We are using what for the company?

The Clerk: Numbers.

(Testimony of George L. Schmutz.)

Mr. Vitousek: I think we can give them one number and letter them.

The Court: That's my thought. [1384]

The Clerk: Are these offered?

The Court: Just a minute. I think they were simply marked for identification. Yes, they are now company's exhibit "A" for identification. So you had better technically offer them.

Mr. Vitousek: As I recall, they were marked for identification on the testimony of Mr. Austin yesterday.

The Court: That's right.

Mr. Vitousek: If the Court please, we offer the reports in evidence, from 1924 to 1943, and ask that that portion of the reports showing the summary of the books of the company, the records of the company, be received.

The Court: Yes, with that limitation they may be received. It being distinctly understood that the matter in the forepart of each report reflecting someone's opinion as to what the figures show is not part of the evidence.

The Clerk: That will be Honolulu Plantation Exhibit No. 13-A to 13-T inclusive.

The Court: 13-A to T?

The Clerk: 13-A to 13-T inclusive.

(The documents referred were received in evidence as Honolulu Plantation Company's Exhibits 13-A to 13-T inclusive.)

Mr. Vitousek: If the Court please, in going through these after they had been marked for iden-

(Testimony of George L. Schmutz.)

tification yesterday, I [1385] noticed that in some places there are pencil figures.

Mr. Rathbun: They are not ours.

Mr. Vitousek: I do not believe the pencil figures could be received. It shows somebody's computation. Only the printed matter should be received.

The Court: Yes, only the printed figures.

Mr. Rathbun: Now, if your Honor please, in the cross-examination of this witness I have marked for identification as Government's Exhibit No. 1, table 1, attached to the claim that I have been referring to as being the claim filed in Congress, or prepared for the purpose of filing in Congress. I want to ask the Court that the whole book, the document that I am using, be marked for identification.

The Court: Very well, it may be marked for identification. Is there any need to give it a different marking than that?

Mr. Rathbun: We have only one page and we can make it the whole thing, Exhibit 1 for identification.

The Court: I think that might be satisfactory, rather than having two marks. Very well. That was Government's Exhibit—

The Clerk: No. 1 for identification.

The Court: —1 for identification, enlarged to become the whole Congressional claim document.

(Document referred to was marked "U. S. Exhibit 1 for identification.") [1386]

(Testimony of George L. Schmutz.)

By Mr. Rathbun:

Q. Mr. Schmutz, since the adjournment yesterday, have you found out whether or not this Government Exhibit No. 1 for identification was actually filed with Congress or some committee of Congress? A. I made no investigation.

Q. You didn't ask? A. No, sir.

Q. On table 1 of this Government Exhibit 1 for identification, as you testified now in this case, are you cognizant of the fact that in the amount of money shown as net income available for interest on the investment that there is included in the year 1937 compliance payments paid by the U. S. Government? A. Yes, sir.

Q. Do you know how much they were for that year?

A. I don't recall off-hand but they are in the report.

Q. What are those compliance payments?

A. It's a benefit payment made for a subsidy by the Government for the production of raw sugar.

Q. It is a subsidy, is it?

A. It is a subsidy in lieu of permitting the price of sugar to rise.

Q. Wasn't the purpose of it for an economic reason so far as the sugar industry in Hawaii was concerned? [1387]

A. Yes, in addition to the further fact that the Government has had a policy apparently to pre-

(Testimony of George L. Schmutz.)

vent the price of sugar from seeking its competitive level.

Q. You have stated that. You answered my last question?      A. Yes, sir.

Q. In other words, Cuban sugar and beet sugar were competitive factors so far as the Hawaiian sugar market is concerned, were they not, at the time this was put into effect?

A. I don't recall the reasons for it.

Q. I didn't ask you that.

A. Well, I do not know the fact.

Q. You don't know the fact as to whether they were?      A. That is correct.

Q. You never investigated that?

A. No, sir.

Q. Wouldn't that have some materiality, if it were a fact, in your conclusion that this was a sound company, successful, and so forth?

A. It wouldn't affect my opinion.

Q. It wouldn't affect it at all?      A. No, sir.

Q. In the year 1937, this shows the compliance payment—we'll take the first year that it shows up. In the year 1943, in which year this company paid a dividend of \$150,000, and showed net income available for interest on the investment [1388] of \$186,969, were you cognizant of the fact that making up that sum of money available as net income for interest on the investment \$177,416 was paid by the U. S. Government under this subsidy?

A. If that is the figure, that is in the report.

(Testimony of George L. Schmutz.)

Q. Are you cognizant of that as you testified in your opinion of this case?

A. Yes, I am, if that is in the report.

Q. Did you have that figure in mind when you gave your opinion?

A. Yes, but you must remember that that one hundred eighty-six thousand figure isn't correct.

Q. Well, just answer my question, please. We'll attend to the correction.

A. Will you read the question?

(The reporter read the question referred to.)

A. If that's what the book shows, I was cognizant of it.

Q. In the earnings of this company for that year, the net income was a little less than ten thousand dollars, excluding that compliance payment, wasn't it?

A. I do not believe that to be a fact.

Q. You do not? A. No, sir.

Q. Do you believe the annual report of this company? A. I do. [1389]

Q. Was it \$190,000 as shown by that report? (Hanging book in evidence to witness.)

A. The annual report for the year ending December 31, 1943, at the bottom of page 14, shows a net profit for the year ending December 31, 1943, transferred to surplus, of \$190,302.78, but out of that has been taken—

Q. Never mind what's been taken. You answer the question. A. You're not being fair.

Q. Now, I'll tend to whether I'm fair or not.

(Testimony of George L. Schmutz.)

I move that that answer be stricken, if your Honor please.

Mr. Vitousek: If the Court please, we object to the answer being stricken. The witness has a right to explain his answer. He has been shown the book and asked if he took into consideration certain facts. He said that only ten thousand dollars some odd were shown. Now, the witness is explaining what is correct. He is entitled to explain his answer.

Mr. Rathbun: And he is entitled to say that I am unfair in explaining that answer?

Mr. Vitousek: Maybe you were in shutting him off.

Mr. Rathbun: Well, I think he was unfair—I'll answer it that way—all the way through.

The Court: The witness may explain his answer.

A. May I have the report to explain it? [1390]

Q. I don't know what explanation is necessary. I have asked you for the amount and you have answered it.

A. The explanation is briefly this, that you will find up above in the cost of operations there has been an arbitrary deduction of \$44,210.62 for the amortization of leaseholds and a deduction of \$189,305.82 as an arbitrary deduction for depreciation.

Q. Are you through now? A. Yes, sir.

Q. The earnings from the production of sugar for that year were not \$190,302, were they?

A. No, that is correct, they were not.

Q. Now, you disagree with this statement? Is that one of the items that you had reference to

(Testimony of George L. Schmutz.)

when you said the figures in the column of net income were incorrect yesterday?      A. Yes, sir.

Q. That's the extent of the error, is it?

A. No, sir.

Q. The difference between \$186,969 and \$190,302?

A. No, sir, a recasting of that statement that you have before you—

Q. Is that one of the things?

A. That is, yes, sir, that is one of them.

Q. All right, as far as that amount is concerned, the difference was only six thousand, four thousand dollars? [1391]

A. No, the difference would be \$189,000 plus the \$44,000.

Q. One hundred eighty-six less-taking off of one hundred ninety—

A. It would be one hundred eighty-seven. There were two items, the one hundred eight-six thousand and forty-four, as I recall.

Q. I didn't ask you about the forty-four. I said so far as the items shown on this exhibit as net income is concerned, and the items shown as net profit in the exhibit for 1943, the annual report, the difference is about four thousand dollars on those two items, isn't it?

Mr. Vitousek: If the Court please, I think we are entitled to have this exhibit, what exhibit counsel is referring to. He's been talking about—

Mr. Rathbun: I said '43.

Mr. Vitousek: I'm not a witness. You don't

(Testimony of George L. Schmutz.)

need to argue with me. I'll state my position and the Court can decide whether I am right or not.

The Court: I can clear it up. First, the first document that the question referred to, which mentions table 1 was Exhibit 1 for identification. And the other was a part of Exhibit 13 for identification.

Mr. Rathbun: Part of exhibit what?

The Court: Thirteen, not for identification; part of [1392] 13 actually.

Mr. Rathbun: This is part of the whole bunch.

The Court: It should have a letter on it, 13 what.

Mr. Rathbun: That's the year 1943.

The Clerk: It's 13-T.

Mr. Rathbun: For 1943.

Mr. Rathbun: Now, in 1942—

The Court: I'm not sure that the question was answered. Does the record show an answer?

(The reporter read the last question.)

A. Well, in answer to your question, I do not follow your arithmetic.

Q. In what respect don't you follow it?

A. I don't see how you get four thousand difference, or six thousand, or whatever you said.

Q. Isn't the difference between \$186,000 in round figures and \$190,000, four thousand dollars?

A. The difference between those two figures is four thousand dollars.

Q. That's what I asked you.

A. Then that is correct.

(Testimony of George L. Schmutz.)

Q. In the year 1942, on the figures shown under the condensed statement of profit and loss in this annual report for that year, is an item of \$250,004.92, conditional payments under the sugar act. That's that subsidy we have been talking [1393] about?

A. Yes, sir.

Q. And the net profits for that year were \$233,668.37, using that figure in arriving at that result, is that correct?

A. Are you talking about transferred to surplus at the bottom of the page?

Q. Yes, I am.

A. Yes, the report for the year 1942 shows there was transferred to surplus at the end of the year \$233,668.37.

Q. And a dividend was paid in that year, wasn't it?

A. Yes, sir.

Q. The dividend was paid on the basis of net profit transferred to surplus, shown in this report on that year, wasn't it?

A. Well, I suppose it was.

Q. Well, do you know?

A. No, I do not.

Q. Did you try to find out?

A. No, I did not. It was immaterial to me. I knew it was paid and I knew they had the money to pay it.

Q. I didn't ask you whether it was immaterial. I asked you a plain question.

A. I made no investigation.

Q. The document marked Government exhibit 1 in evidence, under the heading of net income

(Testimony of George L. Schmutz.)

available for interest on [1394] investment, in table 1, shows the net income to be \$28,005.44?

The Court: Exhibit 1 for identification.

Mr. Rathbun: Yes, your Honor.

The Court: May I have that figure?

A. That is correct.

The Court: What is the figure again?

Mr. Rathbun: \$28,005.44.

Q. Also included in this 1942 annual report in the figures which are used to obtain the result of net profit for the year is an item of \$194,230.10, U. S. Government condemnation award. Do you know what that is?

A. It was money received from the U. S. Government for—in payment of damages to crops, I believe, or perhaps for land taken or improvement taken. It was a condemnation award.

Q. In the year 1941, as shown by the annual report for that year, there is an item of conditional payment on the sugar act of \$256,682.96. That is this same subsidy that we have been talking about?

A. May I see that, please? (Mr. Rathbun hands exhibit to the witness.) Yes, that is correct.

Q. And that figure is used among other figures to arrive at the net profit for the year of \$187,140.46, is it not?

A. That is correct. That isn't the net profit for the year. That says transferred to surplus.

Q. It says net profit, doesn't it? Are you going to [1395] dispute the report?

(Testimony of George L. Schmutz.)

A. Pardon me. I am sorry. It does say net profit for the year transferred to surplus.

Q. I thought so. A. I apologize.

Q. In that year a dividend of \$187,140.46 was paid, wasn't it? No, strike that. \$150,000 dividend was paid, was it not? A. Yes, sir.

Q. In the year 1940, as shown upon the annual report for that year, among the items used to arrive at the net profit for that year is an item of \$271,388.26, conditional payment under the sugar act, is there not? A. \$271,388.26, that is correct.

Q. That's the same subsidy that we have been talking about? A. Yes, sir.

Q. In that year a dividend was not paid, is that right? A. That is the year 1940?

Q. Yes. A. There was not paid a dividend.

Q. For that year ended December 31, 1940, there was a deficit of \$382,098.78 in the surplus account, was there not?

A. Yes, in the surplus account there was a deficit, \$382,098.78. We are not talking about the surplus we were [1396] talking about before.

Q. Well, will you please answer my questions. Confine yourself to that.

A. Yes, sir, you were right.

Q. In the year 1939, as shown by the annual report for that year, among the items used to arrive at the sum of \$197,559.11 as a loss for that year transferred to surplus, there is included an item of \$210,182.75 as a conditional payment under the sugar act, is there not? A. That is correct.

Q. And that is this same subsidy that we have

(Testimony of George L. Schmutz.)

been talking about?      A. That is true.

Q. It showed a loss for that year of \$197,559.11, didn't it?

A. By this method of accounting, that is right.

Q. Well, it's their method of accounting, isn't it?

A. That right, right.

Q. Are you going to dispute it?

A. Well, I dispute the reasonableness of it from the standpoint of getting at the earnings of the property.

Q. You wouldn't use it yourself the way they have it?

A. I did not use it the way they have it for the reasons that I have mentioned before.

Q. You still insist in saying that the earnings of this [1397] company, the earnings record, was one of the things you considered?

A. I didn't hear the question.

(The reporter read the last question.)

A. That's one of the matters which I took into consideration.

Q. In the year 1939 the company had a deficit in the surplus, deficit in the surplus account of \$548,585.86, did they not?      A. That is correct.

Q. They paid no dividends in that year either, did they?

Mr. Vitousek: What year was that?

A. That's true—'39.

Q. Not surprising, is it? As shown by the annual statement of 1938, this company showed a loss at the end of that year of \$333,629.93, didn't they?      A. That is correct.

(Testimony of George L. Schmutz.)

Q. And they showed a deficit in the surplus account for that year, at the end of that year, of \$378,498.12, is that correct?

A. I do not have the figures. (Mr. Rathbun hands book exhibit to witness.) The deficit shown is \$378,498.12.

Q. Now, one of the effects of these deficits in surplus account and losses in earnings for the year to carry on business they have to call on their credit, don't they, with the [1398] bank?

A. No, sir, that is not true because this several hundred thousand dollars each year which has been charged for depreciation and amortization is money which has been earned and charged off on the books to show those losses.

Q. They haven't got the cash, though, have they? A. Certainly they've got the cash.

Q. In surplus?

A. Not in the surplus but they've got it in the earnings for the year.

Q. If they wanted to bring their surplus even they'd have to go and call on their credit, wouldn't they, the bank?

A. If that were necessary, yes, but in this particular—

Q. If they needed the money?

A. If they needed money—

Q. For the surplus account?

A. For the surplus account. But if they didn't need money for operations, that would be different. In this particular year there was two hundred forty-six thousand dollars of money that they

(Testimony of George L. Schmutz.)

earned that they arbitrarily charged off the books for depreciation and amortization of leasehold, which is money they did not spend.

Q. Did you know whether during the years 1939, 1940, '41 and '42 they went to the bank and borrowed money? A. No, I did not. [1399]

Q. Did you try to find out before you gave this opinion you have given here?

A. No, sir, I did not. I don't think that the value of any property of this kind would be predicated upon the earnings of two, three or four years.

Q. Oh, all we could make in more than two, three or four years. That's what's bothering you. In the year 1937, as shown by the annual report for that year, among the items used to arrive at a net profit of \$407,361.42 is the sum of \$138,495.17 as estimated accrual under the sugar act of 1937. Is that this same subsidy we have been talking about?

A. If you will let me see it, I will tell you. (Mr. Rathbun hands book exhibit to witness.) Yes, sir, that is correct.

Q. Why do they say "estimated" there?

A. Frankly, I don't know.

Q. Well, you had been led to believe that it hadn't been paid yet, wouldn't you?

A. No, I don't think so. Wait. Pardon me. I would be let to believe that.

Q. I thought so. What year did these subsidies first go into effect?

A. Well, it's called the "Sugar Act of 1937," and whether there was any subsidy paid in that year or not, I don't know.

(Testimony of George L. Schmutz.)

Q. Now, you said yesterday when I was asking you questions [1400] about this Government Exhibit 1 for identification, that the amounts in the column under net income available for interest on investment were not correct. Will you please point out in what respect they are not correct?

A. Well, let us take the year 1943, which is the last one for illustration.

Q. Yes?

A. The amount shown at the bottom of the page as net profit transferred to surplus was \$190,302.79.

Q. Now, you are not talking from the document, Government Exhibit 1 for identification, are you?

A. I am talking from figures which I have in my hand, which were copied from that document.

Q. Will you please confine yourself to my question and have in mind the figures on table 1 in Government Exhibit 1 for identification?

MR. VITOUSEK: If the Court please, the question was—he made a statement there that it is not correct. Why are they not correct? And the witness is explaining. I think he is entitled to do that.

MR. RATHBUN: Well, there is no use of getting into a mix-up as to what we mean. The item that I am directing his attention to appears on that column as \$186,969.88, for 1943.

MR. VITOUSEK: Well, we still maintain—

MR. RATHBUN: To what extent is that incorrect?

THE COURT: The question is clear.

A. It is incorrect for these reasons, that, first, the amount shown as transferred to surplus, \$190,302.78, that includes a deduction, a book deduction.

(Testimony of George L. Schmutz.)

for depreciation of \$189,305.82. It includes a further deduction for amortization of \$44,210.62. It includes an item for loss on equipment, discard of \$3,555.65. It also includes damages to growing crops of \$440.40. It also includes the sale of labor and supplies to others in the amount of \$14,706.68. It also includes an item for liquidated damages to fields in the amount of \$2,550. It also includes the sale of second-hand bags in the amount of \$7,467.86. It also includes profit on the service station of \$2,021.23. It also includes crop loss, land reclaimed by the Navy, \$3,815.19. It also includes loss on crops, fields converted, of \$662.81. Now, these are all figures that were taken from that same report, Exhibit 13, for the year 1943. And when those pluses and minuses are taken into consideration, the net product for that year, 1943, instead of being as shown on table 1 marked for identification, \$186,-969.88, would appear to be \$404,666.70.

Q. Now, you object, in other words—the error that you mentioned yesterday is the method of arriving at that sum, whatever sum it is, is that right?

A. It isn't a question of method. It's a question of purpose. [1402]

Q. Well, purpose, then. The purpose is shown on table 1 as being net income available for interest on investment, so far as that document is concerned, isn't it?

A. That's the way the table reads, yes, sir. And that isn't exactly what it is.

(Testimony of George L. Schmutz.)

Q. Well, it was filed that way and you used that exhibit in your report, didn't you?

A. That is correct.

Q. When did you discover this that you have just testified to, to change all that?

A. After my—in the last month I made the discovery.

Q. Did you check it at the time that you prepared this claim for Congress to see whether or not it was correct?

A. These tables were prepared for me in San Francisco in the office of the Honolulu Plantation Company. And—

Q. And you just accepted them?

A. And I accepted them without checking them, yes, sir.

Q. But this time you didn't accept them that way?

A. This time I checked them, that is correct.

Q. What caused you to make that check?

A. If I was going to be subject to cross-examination, I certainly wish to verify a lot of figures before I use them. That was one purpose. And the second purpose was that I accidentally discovered that there happened to be an error in that column. [1403]

Q. Well, on your first reason, you would check them if you were going to testify in a case under oath?

A. That is correct.

Q. Don't you think it is just as solemn to check them to see that they are correct when you

(Testimony of George L. Schmutz.)

appear before a committee of the U. S. Congress?

A. I do.

Q. And try to establish a claim of three million dollars against the United States? A. I do.

Q. But you didn't do it? A. That's right.

Q. Getting back to the year 1943 again, the Honolulu Plantation Company meant to tell the public by filing this annual report for that year that the net profit for the year ended December 31, was \$190,302.78, did they not?

A. According to their method of bookkeeping, that is correct.

Q. And you disagree with that method?

A. Well, it was made for a different purpose. It was not—

Q. All for a different purpose. You disagree with it, then?

A. Well, I disagree that that isn't a true reflection of what the net profit was. [1404]

Q. Do you know of any reason why they should seek to make it anything other than what it was really?

A. Well, I was interested in the enterprise and not their peculiar method, not peculiar method but method of keeping books in setting up the depreciation of the amortization, and particularly in taking up the consideration of the non-recurring items of expense or non-recurring items of income, such as condemnation awards, and so on.

Q. Do you know if the Honolulu Plantation Company at any time in any of these years had

(Testimony of George L. Schmutz.)

taken the trouble to correct these reports as they are filed?      A. No, sir.

Q. To that extent?      A. No, sir.

Q. Never have, as far as you know?

A. No, sir. In other words, this report was made for the purpose of reflecting the condition of the company.

Q. I didn't ask you the purpose, did I?

A. Very well.

Q. When that report is filed with the public body in this Territory for these years, and any member of the public that goes and looks at it, has a right to believe that the earnings are as they are set forth, has he not?      A. He has.

Q. And that may have influenced the purchase of stock [1405] by some people that bought stock in the company, don't you think so?

A. You mean referring to this one item, without looking back to see how it was made up?

Q. What they state to be the net profit for the year, that item?

A. Well, I would say that it would be an uninformed purchaser who would rely upon that figure.

Q. You would? You said that one of the things you took into consideration here in arriving at this value was the public response to their stock, didn't you? You meant by that in purchasing this stock?

A. That is right, but—

Q. That answered my question.

A. Well, I'd like to explain.

Q. Well, there is no explanation necessary. That can be answered Yes or No.

(Testimony of George L. Schmutz.)

Mr. Rathbun: I submit that he's answered it.

The Court: The witness may answer a question Yes or No and is also entitled thereafter to give his explanation.

Mr. Rathbun: I object to it as not responsive. Exception.

A. The reason I believe the public would be uninformed if they stopped at that figure is because in some of these cases that figure happens to be composed of as much as one [1406] hundred eighty thousand dollars of award, condemnation award, which they wouldn't expect to get in subsequent years; and there are other items of non-recurring income or perhaps non-recurring expense, which are reflected in this item.

Q. Are you through, now? A. Yes, sir.

Q. Do you know whether or not this is the same report they gave the S.E.C. for the same years? A. I do not know.

Q. Did you try to find out? A. I did not.

Q. Now, you used the expression in your testimony yesterday, in fixing a time, as of the time when these leases were renewed, or most of them—what year was that, now, that you used yesterday, so there will be no confusion about it?

A. I used for what purpose?

Q. I don't know what purpose it was. I have forgotten.

Mr. Vitousek: May I have that question read? I submit it is not intelligible and I object to it. He used a time. We used a lot of times.

The Court: The question may be read.

(Testimony of George L. Schmutz.)

(The reporter read the last question.)

Q. I think you used in connection with the statement that it "became a new enterprise from then on."

A. In 1936. [1407]

Q. 1936? Now, why did you take that particular year of 1936?

A. Take it for what purpose?

Q. For any purpose? The purpose that I just stated what you said.

A. I said it became a new enterprise in 1936.

Q. Because of the fact that they had these lease renewals in that year?

A. Yes.

Q. Did they have the renewal of all of their leases in 1936?

A. I thought they did.

Q. Well, did you find out the fact about it?

A. I did. I made investigation from the company and also from counsel regarding the effect of certain leased documents.

Q. And you found that all of their leases expired and were renewed in '36?

A. Substantially.

Q. You acted on that assumption, then?

A. That is correct.

Q. In your opinion in this case, in giving your opinion in this case?

A. Yes, sir.

Q. Are you familiar with an exhibit in this case, 9-C, being a lease with one McCandless and the Honolulu Plantation [1408] Company, dated December 28, 1929?

A. I read the lease but I do not recall the features of it.

(Testimony of George L. Schmutz.)

Q. Is that one of those that you said was renewed in '36 or not?

A. I am not sure whether it was or not.

Q. You don't know?           A. No.

Q. You still took that into consideration in fixing—you took '36 in fixing this enterprise because the lease had been renewed?

A. Well, I made no computations as of 1936.

Q. Why did you mention it, then? What is the significance of presenting a new enterprise?

A. Well, had the appraisal been made in 1935, for the purpose of illustration, with leases that were just to go out, and the probability that some of them might not be renewed or those that were renewed might have to be renewed at higher figures, there is the question as to how much value you'd put on the enterprise with only a year of continued use of the land.

Q. What was the significance of your statement that it thereby became a new enterprise?

A. Because they had their leases fixed up for another 30 years.

Q. As of '36? [1409]

A. In other words, they had the rights of use and enjoyment of certain lands for another 30 years at that time.

Q. As of 1936?           A. That is correct.

Q. Are you familiar with the lease in evidence as Exhibit 9-D, being a lease from Francis Brown to the Honolulu Plantation Company, dated November 5, 1936?

(Testimony of George L. Schmutz.)

A. I saw all of those leases but I don't recall—

Q. What was the term?

A. I don't recall the terms of those leases.

Q. Are you basing your opinion on that partially, aren't you, in valuing this, in testifying to this value that you have done in this case?

A. Well, I think I can explain that to you.

Q. There's no explanation necessary if you will just answer my question.

A. I base my opinion upon the assumption that as of the date of the first taking here there's 4,283 acres to which Honolulu Plantation Company had the right of use and enjoyment. Now, whether that was in one lease or another lease was immaterial.

Q. Are you through?           A. Yes, sir.

Q. Are you familiar with Exhibit 9-E, a lease from the so-called Aluli heirs and Honolulu Plantation Company, dated [1410] May 28, 1935?

A. I saw that lease also.

Q. In connection with any statements you made, you had that lease in mind, did you?

A. I had in mind all of the leases which comprised the 4,283 acres of cane land.

Q. Did you have that lease in mind?

A. If that was one of the leases, I had it in mind.

Q. But do you know whether it was or not?

A. Offhand I don't recall. I know that that was, that there was an Aluli lease and there was a Bishop lease and Queen Emma lease, Damon lease, various others.

(Testimony of George L. Schmutz.)

Q. I'll get to all of them and ask you about it.

A. Well, I can give you one answer to answer all of your questions.

Q. Well, just sit there and answer them. Were you familiar with Exhibit 9-F, a lease from the Oahu Sugar to the Honolulu Plantation Company, of January 17, 1941?

A. Yes, I read it.

Q. Did you read that lease, did you?

A. I read all of them.

Q. Well, you remember that one?

A. I don't remember any of the details, no.

Q. As you sit there now, do you know the term of it?

A. No. [1411]

Q. Did you when you gave your opinion yesterday, did you have it in mind?

A. I had all of these leases in mind.

Q. But you didn't know the term of it yesterday, did you?

A. Not that particular—

Q. Or today?

A. Not that particular lease, no, sir.

Q. Exhibit 9-G, lease 6600 of the Bishop Estate, with the Honolulu Plantation Company, dated July 1, 1940, did you have that lease in mind when you gave your opinion?

A. That was one of the leases—I did.

Q. Did you have in mind the term under that lease?

A. No, not particularly.

Q. You didn't know, as you sat there yesterday and gave your opinion, is that right?

A. That is correct.

Q. Exhibit 9-H, a lease with the Austin Estate

(Testimony of George L. Schmutz.)

and Honolulu Plantation Company, dated December 15, '41, did you have that one in mind?

A. Same answer.

Q. You didn't know the term?

A. Same answer.

Q. Exhibit 9-I, lease of the O.R. & L. with Honolulu Plantation Company, dated July 24, '36, did you have that in [1412] mind?

A. I had that in mind if that was one of them.

Q. Did you have the term of it in mind?

A. No, not specifically.

Q. Exhibit 9-J (being a lease to the Queen Emma Estate to Honolulu Plantation Company, dated March 2, 1937, did you have that one in mind?

A. If that was one of them, if that was one of them, I did.

Q. But you didn't know the term, didn't have that in mind when you gave your opinion?

A. Not specifically.

Q. 9-K, a lease with the Damon Estate and the Honolulu Plantation Company, did you have that one in mind?

A. If that's one of them. I did.

Q. Did you know its term?

A. I believe that that was, that was the one that had expired and that there was an exchange of letters and an agreement to renew the lease and an acceptance of it, and on advice of counsel I assumed that that was a binding contract to renew the lease.

Q. For how long?

(Testimony of George L. Schmutz.)

A. I forget the term now.

Q. You didn't know that when you testified, then, right?

A. No; as I say, I am basing my opinion upon the assumption [1413] there's 4,283 acres of cane land to which they had the right of use.

Q. I have heard you say that three times and I haven't asked you yet that question. You have answered my question.

Mr. Rathbun: May we take a recess now, your Honor?

The Court: Yes.

(A short recess was taken at 10:05 a.m.)

After Recess

By Mr. Rathbun:

Q. In Exhibit 9-K, which is the so-called Damon lease, it is recited that there are 1223.91 acres of cane land. Are you familiar with that?

A. I read the document.

Q. Applying the rate of a thousand dollars that you used to that, would amount to a thousand times that acreage, wouldn't it? A. That is correct.

Q. If there is no lease with the Damons after the year 1943, that would make a thousand times that acreage difference in your opinion, wouldn't it? A. That is right.

Q. In connection with the condemnation suit, will you please define for me business loss?

A. A loss to business would be a depreciation or a shrinkage in the amount of that portion of the value of the [1414] property which was not imputable to the physical property itself, and which

(Testimony of George L. Schmutz.)

might be attributable to a going concern, established business, enterprise, value or whatever you wish to call it, but it is something, it is an intangible in contradistinction to a tangible loss.

Q. You are the author of a book entitled "Condemnation Appraiser's Handbook," published in 1938, are you not?      A. I am.

Q. And you were the author of the following language used in that book on page 137, all of the material, you were the author of it, weren't you?

A. I was.

Q. And you said there, did you not, on page 137: "Damages to business are not compensable in California."—Is that right?

A. That is correct.

Q. That is true in other places than California also, isn't it?

A. I believe that that is the general rule.

Q. You said further, did you not:

"It was held, indeed this is but another way of phrasing the real contention of appellant, as quoted from his brief, that business is property, and when the taking by the state or its agencies interferes with, impairs, damages or destroys a business, compensation may be recovered therefor. We are not [1415] to be understood as saying that this should not be the law when we do say that it is not our law." You wrote that?

A. That's a quotation from an edition—

Q. You put it in your book?

A. That is correct.

(Testimony of George L. Schmutz.)

Q. You put it in your book to illustrate your statement that damages to business are not compensable? A. That is true.

Q. Did you, in giving this opinion of value in this case, take into consideration the taking of land by the United States previous to the ones involved in this case?

A. No, my opinion of the value reported, of the damage reported, is based solely upon the losses which I assumed to have been made, namely, 1087 acres of cane land involved in this consolidated action.

Q. The cases that—I think I have asked you about it, I'm not sure—lands involved in a civil suit in this Court, No. 416, did you investigate at all the amount of land taken in that proceeding? That is not in this case. A. Oh, no, I did not.

Q. 430?

A. If they are not in this case, I did not investigate them.

Q. All right, then, you didn't investigate or know about what I asked you in 416, 430, 434, 436, 442 and 452—right? [1416] A. That is right.

Q. Assuming that after 1936 and previous to the first taking in these cases the Government took in those particular cases in excess of a thousand acres of land, or in the neighborhood of a thousand acres, what would be your opinion of how much that lowered the before and after basis of the value of what was remaining?

Mr. Vitousek: May I have that question?

(Testimony of George L. Schmutz.)

(The reporter read the last question.)

A. After 1939 and up to the present time, if that were the case, I would say that it would be at the rate of about a thousand dollars an acre.

Q. You'd use the same rate that you testified to heretofore? A. Yes, sir.

Mr. Rathbun: I assume, if your Honor please, that the Court will take judicial notice of its own files?

The Court: That's right.

Mr. Rathbun: In those cases.

Q. Now, in 1939, up to that time this company was able to make replacements of the cane that had been taken by the Government, have they not been?

A. Yes, there were replacements made at various times.

Q. Of other lands available?

A. Of other lands which were available. That is true. [1417]

Q. What replacements were used to take the place of the lands in the Hickam Field taking?

A. I don't recall. I have a record of replacements but I cannot tell you where they were.

Q. You can't? A. No, sir.

Q. You can't tell what land was used?

A. No, sir, I cannot.

Q. Can you tell what land was used to replace the land taken in Civil 416? A. No, sir.

Q. Can you in regard to the land taken in Civil 436? A. I cannot.

(Testimony of George L. Schmutz.)

Q. Can you in regard to the land taken in Civil  
430? A. I cannot.

Q. Civil 452? A. No.

Q. Do you know whether or not after the Hickam Field taking the Honolulu Plantation Hickam Field taking the Honolulu Plantation Company put any item on their books of loss of any kind on those lands? A. I do not.

Q. Did you try to find out?

A. No, I did not.

Q. Do you know whether or not they put any item on their books of any loss sustained as a result of the takings [1418] in Civil 416, 436, 430, 452 and 442? A. No, I do not.

Q. And you didn't try to find out?

A. I did not.

Q. Has there been any item put upon the books of this company for any loss in connection with the takings of the land involved in these cases?

A. You mean a write-down of book value?

Q. Any kind to show any loss of the land, the use of the land.

A. I do not believe that the books have been adjusted for losses or increases in prices or for anything else. I think they are carried right straight through from the 1932 established value, with deductions for annual accruals of depreciation and additions for capital improvements.

Q. There is no item on the books specifically setting forth any loss as a result of the takings in the cases that we are trying here?

A. Not so far as I am aware.

(Testimony of George L. Schmutz.)

Q. Well, did you look to see?

A. Frankly, I did not.

Q. Just what significance did the previous takes, previous to the ones in these cases being tried, just what significance did the history of those takes have in connection with your opinion? You said you took them into consideration [1419] as history, as I remember your testimony.

A. That is true. In one of the studies which I made before forming my opinion, I took an over-all picture of the losses occurring from 1939 through to the present time for the purpose of getting the over-all picture in shrinkage.

Q. Still you testified that you can't tell how much you would value the shrinkage at on a before and after basis as to those takes?

A. That is true.

Q. Now, that's one of the things that you considered in arriving at this opinion of value, isn't it?

A. That's one of the many things.

Q. Yes, many things. That's one of them?

A. The point that I am trying to make is that valuation is not a mathematical process.

Q. I agree with you perfectly.

A. It is a matter of opinion.

Q. Just opinion?

A. It's opinion. It is a belief founded upon probable evidence.

Q. Like a Judge of the Supreme Court once said, it is a guess by an informed person, is that right?

(Testimony of George L. Schmutz.)

A. No, I don't agree that it is a guess.

Q. You don't agree with Judge Roberts on that?

A. If that is what he said, I don't agree with him. [1420]

Q. O.K.

A. I think it is an opinion instead of a guess, and there is a difference between those two words.

Q. Well, he is a little higher authority than you are in making those pronouncements?

A. He is, indeed.

Mr. Vitousek: If the Court please, we are going to discuss the merits or demerits of Judge Robertson?

The Court: That is concluded.

Mr. Rathbun: I'm through on that. Sorry to take so much time but I have to read figures all the time.

The Court: I appreciate that.

By Mr. Rathbun:

Q. Now, I believe you stated in substance that the output of the mill of the Honolulu Plantation Company before these takings was 20,000 tons and 15,000 tons thereafter, is that correct?

A. That is true.

Q. And you made that statement in connection with another statement that you made to the effect in substance that this would tend to depreciate the value of the mill because of over-capacity and increase of production cost and affect the fair return?

A. Fair return on the investment in that facility. That is correct. [1421]

Q. Now, when you said fair return you meant

(Testimony of George L. Schmutz.)

by increasing the cost of production less money could be made through the mill, didn't you?

A. I meant there wouldn't be enough to pay a fair return on the cost of the mill.

Q. That's earnings, isn't it?

A. Well, there must be earnings to pay interest on the cost of anything if its costs is to be synonymous with its value.

Q. I would think so. That answers the question. Over-capacity of the mill—what you meant to say by that was that the cost of, the monies that were in that mill to put it in the condition that it was previous to these takes couldn't return a fair investment, couldn't make a fair return on the amount invested in the mill because of a decrease in the acreage used to plant cane, is that right?

A. No, that is not right. What I meant by over-capacity was that there was just more mill there than could be used.

Q. All right. But that had an effect in your arriving at your opinion, didn't it?

A. That's one of the matters, yes, that I considered.

Q. Over-capacity of that mill would have no effect whatsoever except to decrease the earnings on the capital invested in the mill, is that right?

A. No, that is wrong. [1422]

Q. Well, wherein is it wrong?

A. Over-capacity simply means that you have a greater amount of capital invested than it is worth.

Q. What makes—

(Testimony of George L. Schmutz.)

A. In other words, the smaller mill costing less money would serve the same purpose.

Q. That's just another way of saying that it is over-capitalized so far as their sugar cane lands are concerned, is that right?

A. Well, I don't understand your use of the word "capitalize," because we are not capitalizing anything.

Q. All right, that's your answer?

A. That is right.

Q. If they had a million dollars invested in that mill and they expected to make a return of six percent on five thousand acres, and two thousand acres were taken away from them, that would have some effect on the value of the mill, you think?

A. I'm sure it would, for the reason that a cheaper mill would serve the same purpose.

Q. All right. When the Government took the lands involved in these cases here, the cane lands that they had under lease were in the same physical condition after they took them as they were before, weren't they?

A. You mean the remainder of the cane land?

Q. Yes.           A. Yes, sir, that is true.

Q. Grow just as good cane?

A. That is true.

Q. And the same method that they were used for before?

A. There would probably be some adjustment there in rerouting water to get to some of these fields where fields had been cut off.

(Testimony of George L. Schmutz.)

Q. Leaving out the water, it didn't change the value at all of the cane lands, did it?

A. It would depend upon where it was. If the Government took from one end, then the answer would be no, it would not affect them.

Q. Well, assuming they didn't take it from one end, just in general?

A. Well, if they took it from the middle it would make quite a difference because there would be isolated portions which couldn't be used.

Q. You are talking about severance again, aren't you?

A. That is right.

Q. My question is, physically the character of the lands didn't change one bit and wasn't changed one bit by any of these takings?

A. It had the same configuration and it had the same improvement on it. [1424]

Q. And it would grow the same kinds of cane?

A. And it would grow the same kinds of cane.

Q. Every piece of machinery in the mill was in the same condition after these takings physically as it was before?

A. That is true.

Q. Didn't have any effect on the physical value of the mill machinery, didn't it?

A. Well, I don't know what physical value is.

Q. What someone would pay for them.

A. What someone would pay for them?

Q. Yes.

A. You are talking about market value, aren't you?

Q. All right.

A. Fair value?

(Testimony of George L. Schmutz.)

Q. All right.

A. Well, the takings had no effect upon the physical condition of the mill.

Q. That's my question.

A. But they did have an effect in my opinion upon the value of the mill.

Q. Of course, you have testified to that in your opinion. Physically it had no effect whatsoever, did it?      A. On the physical condition, none.

Q. It is the same mill the day they took it and it was the same the day after they took it? [1425]

A. That is right.

Q. So that the only thing that was affected was a lowering in your opinion of the value because of this over-capacity, is that right, with the cane lands available?

A. Over-capacity, plus the further fact that because of its oversize it could not be used as efficiently as a mill which was properly designed for the new capacity.

Q. Now, what do you mean by "efficiently?"

A. With the same production costs, for illustration.

Q. Well, cost enters into it, production cost?

A. That affects the value of any machinery.

Q. Of course it does. You are now talking about operating costs, aren't you?

A. That's another phase of this same subject. That is right.

Q. It increases the operating cost, doesn't it,

(Testimony of George L. Schmutz.)

by lowering the cane area available for the use of that mill?

A. Yes, you're pushing around a lot of machinery there which is not serving any purpose.

Q. That's right. And it is only significant then to a man who would look at that property from the standpoint of how much he could earn on that mill with the land that is remaining after the takes?

A. Well, he wouldn't look at it that way, no sir. You cannot isolate these things and assign any particular amount [1426] of shrinkage to the mill or to the water supply system or to anything else. The prospective purchaser in the market will take a broad over-all view without attempting to find out what the components are as regards amount.

Q. In other words, he would disregard, you think a man that was looking at that plant for the purpose of making up his mind whether he would buy it or not, he would disregard entirely in the amount that he would pay for it the fact that the mill was geared to 20,000 tons and only 15,000 tons of raw sugar were available for use in the mill?

A. I didn't say that.

Q. Well, what did you answer to it?

A. He would take it into consideration but he wouldn't assign any particular amount of money to that feature.

Q. He'd pay less for it, according to your opinion?

A. He would.

Q. Because of that?

A. If he were buying the entire enterprise, he

(Testimony of George L. Schmutz.)

would pay less for the enterprise, and how much less he would pay for the mill I don't know.

Q. Because he would know that somewhere along the line there would be too much capital invested in it as compared to the amount of money that could be earned on the 15,000 tons, isn't that it?

A. That's right. [1427]

Q. Well, that's an earnings proposition, isn't it?

A. That is true. It is earnings that affect value.

Q. In the annual report of Honolulu Plantation Company for 1936, being 13-M, do you find therein any item setting forth any loss because of any taking of land by the Government?

A. I don't see any. (Referring to book exhibit.)

Q. All right. I will ask you the same question in regard to the annual report of 1937, being 13-N?

A. I don't see any.

Q. I will ask you the same question in regard to Exhibit 13-O, for the year 1938?

A. I don't see any.

Q. I will ask you the same question in regard to 1939, Exhibit 13-P?

A. I don't see any there.

Q. I notice an item in this last report, "Leased Land, Unamortized Balance, \$317,451.80." What do you understand that to mean?

A. It's a bookkeeping entry for the purpose of showing that there is an obligation to pay rent on leaseholds for the remainder of the term.

(Testimony of George L. Schmutz.)

Q. You consider the liability to pay rent an asset?

A. A liability, an obligation to pay rent is a liability, of course. And as the time passes and the rent is paid and crops are taken off the land, it becomes an asset. [1428]

Q. Well, this company set it forth as an asset, didn't they, to that extent?

A. It's a deduction.

Q. Well, they set it forth as an asset, didn't they?

A. Yes, this is shown as an asset and apparently is a reserve fund which has been set up and shown as an asset.

Q. You answered my question. It is shown as an asset?      A. That is correct.

Q. In regard to the annual report of 1940, being 13—I guess it's G. I can't make it out.

The Clerk: Q.

Q. I will ask you the same question as to whether or not there is any item shown in that annual report in regard to any loss because of the taking of any lands? (Handing book exhibit to the witness.)      A. I don't see any.

Q. I will ask you the same question about '42, which is exhibit 13-S?

A. Your question relates to any mark-down because of takings by the Government?

Q. Yes.      A. I see nothing here.

Q. I will ask you the same question in regard to '43, which is Exhibit 13-T?

(Testimony of George L. Schmutz.)

A. Same answer. [1429]

Q. Now, this amortization item that appears on there, do you know whether or not that item would originate in this way, that when the Honolulu Plantation Company takes a lease on cane land, and it is raw land, brush on it and trees, and so forth, they have necessary expense in clearing it, preparing it for cultivation, do they not?

A. They do.

Q. And on their books haven't they handled that matter by putting down what they spent on it in that respect, and then amortizing that over the life of the lease downward each year?

A. That is probably true for tax purposes, for depreciation accounting.

Q. Well, that's the way they kept their books, wasn't it? A. I wouldn't say for sure.

Q. You don't know?

A. But I think that's right, but I'm not sure.

Q. On the document marked 13-T, the amount of that unamortized balance is \$267,864.78. On 13-S the same item appears under leased lands, does it not? A. Yes, that's right.

Q. So that there's been a depreciation from 1942 to 1943 of the difference between \$279,982.11 and \$267,864.78, is that right? (Handing to the witness two book exhibits.) [1430]

A. That is correct.

Q. And that's the way they kept their books, wasn't it? This tells you that, doesn't it? (Referring to books.)

(Testimony of George L. Schmutz.)

A. Yes, that is a representation of the books.

Q. In 1926, at the close of business for that year, they showed under the heading of "Permanent Improvements and Property Accounts, Houses and Buildings on Leased Land," \$237,210.91? (Handing book exhibit to the witness.)

A. That is correct, that's houses and buildings on leased land.

Q. That's right? They showed reservoir, pipe lines and ditches to the sum of \$643,609.65, did they not? A. That is correct.

Q. They showed railroads, \$565,075.15, did they not? A. That is correct.

Q. They showed roads, bridges and fences, \$93,968.20, did they not? A. That is correct.

Q. Now, each one of those items, year by year, is depreciated on the books, isn't it? A. It is.

Q. So that it reaches a stage dependent upon the rate per year where it completely disappears from the books, isn't that right?

A. No, for the reason that from time to time it becomes [1431] necessary to make replacements or capital additions to build it up.

Q. As to these items. Never mind replacement.

A. If there is nothing done to recapture any of the depreciation, eventually it will depreciate out to zeros on the books, that is correct.

Q. What rate of depreciation did this company use from 1926 on?

A. I haven't the slightest idea.

Q. You didn't try to find out?

(Testimony of George L. Schmutz.)

A. I did not.

Q. This might have all been depreciated out by 1944, as far as you know?

A. Conceivably. But it doesn't so show on the books.

Q. Well, now, you said you didn't know what was on the books.

A. I am talking about these, Exhibit 13.

Q. Yes. These items that I asked you about.

A. I think you will find corresponding items in the 1943 report.

Q. And they will be lower, wouldn't they?

A. Not necessarily. There may have been more money invested.

Q. All right, leaving out any extra investment, those items will disappear in time, depending upon the rate per year [1432] that is used?

A. That is right.

Q. In 1943, under the heading of "Permanent Improvements and Property Accounts," shown on Exhibit 13-T, do you find any item of houses, buildings, on leased land?

A. Yes, I do.

Q. What is the amount of it?

A. \$37,745.67.

Q. Do you find any item of reservoirs, pipe lines and ditches?

A. On leased land?

Q. Yes. A. Yes.

Q. I'm talking about leased land all the time.

A. Yes, \$326,981.54.

Q. Do you find an item of railroads?

(Testimony of George L. Schmutz.)

A. Railroads? Yes, \$36,097.13.

Q. Do you find any item at all covering flumes?

A. Flumes on fee but none on leased land.

Q. Leased land I am talking about.

A. I see none.

Q. There was an item on the '26 report on that, flumes on leased land, \$19,941.99?

A. Well, that's flumes but it doesn't say whether it is on fee or leased land. [1433]

Q. Well, it's an item? A. It's an item.

Q. And there's no item of flumes in the 1943 report?

A. There is for fee but not for lease.

Q. All right. Then if there was any on leased land in 1926, it has disappeared by 1943, hasn't it?

A. Quite possibly because of the amount here shown in '43 on flume for fee and nothing on leased land. So small.

Q. And that would be a fair conclusion from that, that it had depreciated, the item of flumes had been depreciated out from the books, is that right?

Mr. Vitousek: If the Court please, the witness has answered. It doesn't show in the first account under lease. He doesn't know whether it's on leased or not. He is asking an assumption: he has answered the assumption. I think the question has been asked and answered several times.

Mr. Rathbun: I haven't heard it to this question.

Mr. Vitousek: Well, if the Court please, I ob-

(Testimony of George L. Schmutz.)

ject to this questioning. Counsel stated in the beginning of this line of questioning that he is referring only to leased land. The witness on the stand said there is no item for flumes in 1926 under leased land. Now he comes back and asks if it disappeared. Now, is he still referring to the leased land or fee?

Mr. Rathbun: I am referring to flumes. [1434]

The Court: Assuming that it is on leased land, or rather—

Mr. Vitousek: Assuming there were flumes on this leased land.

By Mr. Rathbun:

Q. In 1943 there is no item of flume appearing on fee land or leased land?

A. Yes, there is on fee land.

Q. How much is it? A. \$405.13.

Q. Now, if those flumes are on leased land and the flumes in '26 in the item of \$19,941.91 are on leased land, it depreciated down to the latter amount, hasn't it? A. That is right.

Mr. Rathbun: May we take a recess?

The Court: Yes, we are due for our next recess.

(A short recess was taken at 11:10 a.m.)

After Recess

By Mr. Rathbun:

Q. I call your attention to the document marked 13-C, the report for 1926, and a note at the bottom as follows: "The following Assets are considered to be Investments on Leased Land. 'Houses and Buildings on Leased Lands.' 'Pump No. 6,' 'Reser-

(Testimony of George L. Schmutz.)

voirs, Pipe Line and Ditches,' 'Railroads,' 'Fumes,' 'Roads, Bridges and Fences.' "

Mr. Vitousek: Is that 1926? [1435]

The Court: Twenty-six.

A. Did you have a question on this?

Q. No, I didn't. I am calling your attention to that. You can assume from that through the years that those items were on leased lands that I have been asking about, can't you?

A. Let me see that again, please? (Mr. Rathbun hands book in evidence to the witness.) Yes, sir.

Q. Now, one more item, roads, bridges and fences.

Mr. Vitousek: May I see that?

Mr. Rathbun: Just a minute. Just one question and I'll be through with it. Do you want to see it now?

Mr. Vitousek: Yes. (Book in question handed to Mr. Vitousek.)

Q. On the '26 report, under the heading of roads, bridges and fences, is an item of \$93,968.20, is there not? A. \$93,968.20, that is correct.

Q. And in 1943, as shown by the document marked Exhibit 13-T, that same item appears as \$12,267.38, does it not?

A. That was roads, bridges and fences on leased land, wasn't it?

Q. That's right. A. \$12,267.38.

Q. Over a period beginning with the year 1936 and ending in the year 1944, both inclusive, if you add up on table 1 [1436] Government Exhibit 1

(Testimony of George L. Schmutz.)

for identification, the net income available for interest on the investment on those years, you get the sum of \$1,700,408.29, do you not? If you want to compute it, you may. But we have added them.

The Court: The figure again?

Mr. Rathbun: \$1,700,408.29.

A. What years are those?

Mr. Vitousek: It's a mere matter of computation.

The Court: It's a matter of addition.

Mr. Vitousek: I don't think it is.

Mr. Rathbun: I have a right to ask the computation and base another question on it, so that we will know what we have in mind.

A. It's '26 to '44?

Q. Thirty-six to '44.

A. I am ready.

Q. What do you get?

Mr. Vitousek: What's that?

The Court: He just said he was ready.

A. I haven't checked my figure but I have \$1,-168,583.63.

Q. Well, somebody is wrong. Let's see.

A. What was your figure?

Q. \$1,700,408.

A. Well, now, wait a minute.

Q. Check those amounts. [1437]

A. Wait a minute. I checked with that—

Q. Thirty-six to '44 inclusive.

A. The pluses were \$1,700,408.67?

Q. That's right.

(Testimony of George L. Schmutz.)

A. Now, I took out the two years in which deficits are shown.

Q. That's right, \$531,825.04, that's what I have.

A. That's what I have.

Q. That gives us a balance of \$1,168,583.25.

A. Sixty-three cents.

Q. Well, 63 cents.           A. Yes, sir.

Q. As it appears on this statement over those years, that latter sum was the amount of money they had which was available for dividends or interest on their investment, is that right?

A. That is the way it appears.

Q. By figuring up those same years, the dividends paid, the result is that they paid out \$1,875,000, isn't that correct, on those years?

A. \$1,875,000, that is correct.

Q. So that on the face of that document, then, they paid out \$706,417 over the amounts which were available for dividends.

The Court: The figure again?

Mr Rathbun: \$706,417. [1438]

A. That's the way it appears, that is correct.

Q. Did you, in the preparation of this Government Exhibit 1 for identification examine the statement consisting of 12 pages in the beginning of the document, which statement was signed by Honolulu Plantation Company, by Mr. C. F. Jacobson, president?

A. I did not see that until, oh, months after the report was prepared.

(Testimony of George L. Schmutz.)

Q. Well, at that time you knew that it was going to be used in connection with the claim, didn't you?

A. Yes, I did.

Q. It is stated in there that—on the first page of that statement—pardon me, the second page—

“The geographical location of the lands leased by Honolulu Plantation Company is such that the most economical point of delivery for cane grown by it is the Honolulu Plantation Company Mill in its present location which is owned by the Company in fee. The distance to other mills is so great that delivery to them would not only be impracticable but too costly.” Did you see that statement?

A. I probably did. I read the statement.

Q. Well, hearing it now, do you approve of that statement?

A. I haven't given any thought to it.

Q. Well, give it some, please. You considered the [1439] integrated enterprise, didn't you?

A. I did.

Q. Isn't that one of the features of it, the location of the mill?

A. With respect to its properties, that is true.

Q. Well, what do you say about that statement? Do you agree with it?

A. Well, it would tend to depreciate the value of the land; if they had to haul that cane away to the nearest mill would be the one of Oahu Sugar Company at Waipahu. I don't know. I ~~hadn't~~ given much thought to it.

Q. Isn't the Oahu Sugar Company, it seems to

(Testimony of George L. Schmutz.)

me it was stated here, buying the remaining lands of the Honolulu Plantation Company?

Mr. Vitousek: Now, if the Court please, we have absolutely no objection to that question being asked. It occurred after the date. We call the Court's attention to it and we will go into the matter.

The Court: This is the first reference to it.

Mr. Rathbun: This goes to credibility, that's all.

Mr. Vitousek: All right. It's O.K. with us.

A. Oahu Sugar Company did buy it.

Q. They have actually bought it?

A. So I am informed; that is, they bought a part of the property and C. and H., California-Hawaiian Sugar Company [1440] bought the other part of the property.

Q. How far is the Oahu Sugar Company's Mill from these lands?

A. I wouldn't care to hazard a guess, although some of their cane fields come up to these cane fields.

Q. You can't tell how many miles away the mill is?

A. No. I could scale it on the map

Q. Would you think it was seven miles?

A. Well, you are asking me to guess, and I don't care to do that.

Q. All right. On page 5 of that same statement by the president of the company this appears:

"Honolulu Plantation Company presents this picture: By efficient and far-seeing management and judicious use of large sums of stockholders'

(Testimony of George L. Schmutz.)

money, it welded a disassociated and unrelated number of ownerships of land into an efficiently integrated enterprise, economically balanced, and a homogeneous whole which has operated smoothly and profitably for over forty years.”

Did you have notice of that statement?

A. I don't recall it, but if it is in the document, I read it.

Q. It further says: “It speaks volumes for the ability of its management and the value built into the integrated business structure that from the date of its incorporation to [1441] December 31, 1938, it had paid to its stockholders in dividends Thirteen Million Four Hundred Eighty-two Thousand Dollars (\$13,482,000), in addition to retiring a bond issue of One Million Two Hundred Fifty Thousand Dollars (\$1,250,000). Honolulu Plantation Company has now remaining to it an area of land under lease which can only be operated inefficiently, expensively, and therefore uneconomically.”

Did you have knowledge of those terms?

A. If that is in the document, I read it.

Q. Do you agree with those? That is their theory in this case, isn't it? That's one of the things you rely on in making a valuation?

A. Not on that statement.

Q. What?

A. I say not on that statement. But it is my opinion that there has been a shrinkage in the

(Testimony of George L. Schmutz.)

value of the enterprise by reason of the loss of the 1087 acres I assume to be lost.

Q. You considered their dividend record, didn't you?

A. That was one of the matters that I took into consideration. I took in the history.

Q. I didn't ask you about anything else.

A. All right, yes.

Q. All right. And you think it could be operated inefficiently, expensively and uneconomically as far as the remaining lands are concerned? [1442]

A. I think that it would be an inefficient and expensive operation with only 15,000 ton capacity, or with roughly 3200 acres of cane land. It is too small.

Q. If you adopt that language, then, expensively means from a cost standpoint, doesn't it?

A. Obviously.

Q. Operating cost? A. That is true.

Q. Operating cost goes up, then profit goes down?

A. All things being equal, that is true.

Q. You considered that in coming to your conclusion of value here, didn't you?

A. That's one of the matters that I took into consideration.

Q. A statement is also made by the president as follows:

"Over fifty percent of its invested capital has been dissipated and the value thereof destroyed as a result of the Government's constant attrition."

(Testimony of George L. Schmutz.)

What do you say about that statement?

A. If it's in there, I read it.

Q. Do you agree with it?

A. Of course, his statement refers to the losses commencing January 1, 1939, and that is bringing it up to the present time. I would say that it isn't greatly off.

Q. Well, then, that's adopting it as substantially [1443] correct, your opinion takes that into consideration among other things, is that right?

A. That is true.

Q. And it's one of the basis——

A. Wait a minute. That's as from 1939 to the present time and not as regards these particular takings.

Q. O.K. I show you table 9 on Government Exhibit No. 1 for identification, covering through the year 1945, and ask you whether or not in the last column under totals it can be properly said that that represents the invested capital for the different years opposite?

The Court: What page is that?

Mr. Rathbun: That's on table 9.

A. This is a computation that was made by men in the office of the Honolulu Plantation Corporation——

Q. I didn't ask you about that.

A. May I have that question?

(The reporter read the last question.)

A. That figure represents the values as set up

(Testimony of George L. Schmutz.)

on the books in 1932 less depreciation, plus capital additions.

Q. That is capital investment, isn't it?

A. Capital investment.

Q. That's what I asked you, wasn't it? Now in the year 1939 the capital investment was \$3,355,318.16, wasn't it?

A. That is right. [1441]

Q. The next year it goes down about a hundred thousand, a hundred and fifty thousand?

A. That is right.

Q. The next year it goes down about one hundred eighty thousand, one hundred seventy-five thousand?

A. That is right.

Q. The next year it goes down about two hundred thousand?

A. About one hundred forty thousand.

Q. One hundred forty thousand? The next year it goes down forty-six approximately?

A. Around forty-six thousand.

Q. Forty-six thousand, yes.

A. That's right.

Q. And the next year it goes down about thirty-four thousand, thirty-five thousand?

A. That is right.

Q. The next year it goes down ninety-seven thousand?

A. That is right.

Q. From 1939 to 1945 inclusive that doesn't show that fifty percent of the invested capital has been lost, does it?

A. Certainly not. It isn't intended to show what has been lost.

(Testimony of George L. Schmutz.)

Q. Well, answer my question, please.

Mr. Vitousek: If the Court please, he answered the question. We object to the counsel badgering the witness that way. [1445]

Mr. Rathbun: He's making a speech every time, and it has nothing to do with the question asked. It's not responsive.

The Court: The question was answered. Proceed.

Mr. Rathbun: All right.

Q. I show you table No. 2 in the document marked Government Exhibit 1 for identification, and call your attention to the items under cost per ton, 96°, and the word, abbreviation, Ref., and ask you to examine it with those in mind. Now, on that statement they are attempting to show the cost per ton to the refined state of sugar aren't they?

A. It shows, yes, it shows the cost of 96° sugar, raw sugar, and also the refined cost.

Q. Now, will you tell me, in the year 1940 what their cost of production was on raws, on sugar from their own plantation? Per ton.

A. The direct cost was \$60.73, and with a credit from the sugar because of the Sugar Act of 1937 of \$9.68 left a cost after credit of \$51.05 per ton of 96° sugar for the year 1940.

Q. Now, that document shows that they purchased some raw sugar for refining in the mill, doesn't it?      A. It does.

Q. In that same year, what was the cost to get that to the refined stage?

(Testimony of George L. Schmutz.)

A. Wait a minute. You mean the cost of buying the raw [1446] or refining the raw?

Q. Refining.

A. It isn't broken down. The refining is all raws.

Q. I will direct your attention to it. They paid for outside raw sugar so much per ton, which they put under cost, did they not?

A. That is right.

Q. What did that raw sugar cost them?

A. \$48.84 per ton in 1940.

Q. And what did it cost them to produce raw sugar from the plantation? A. \$51.05.

Q. In other words, it cost them more to bring the raw sugar stage from their own plantation than it did to go out and buy the raw?

A. In that particular year, yes, about two and one half dollars more.

Q. How about the year 1941?

A. You want me to give these figures?

Q. Yes.

A. In the year 1941 it cost, the cost of the plantation raws was \$54.55, and the cost of the outside raws was \$61.76.

Q. Now, that year it happens to be bigger? It cost more to buy it outside?

A. Yes, about \$7.21 a ton more. [1447]

Q. Go to the next year, 1942.

A. In 1942 the cost of plantation raws was \$77.81. The cost of the outside raws was \$70.06.

Q. It cost more that year, didn't it?

(Testimony of George L. Schmutz.)

A. It did.

Q. Than it did to buy the raw sugar?

A. That is correct.

Q. How about the next year?

A. In the year 1943 the cost of plantation raws was \$70.80. The cost of outside raws or the price paid was \$69.79.

Q. So that in all buy one—is that the last year shown? A. No, 1944 is shown.

Q. All right, how about the next year?

A. In the year 1944 the cost of plantation raws was \$101.75. The cost of outside raws was \$71.04.

Q. A difference in how much a ton, over \$30?

A. \$30.71 difference.

Q. Is that the last year shown on that?

A. That is the last year shown.

Q. So that in all but one year they could buy raw sugar and put it through their mill at less cost than they could do it from their own plantation, is that right? A. What table is that?

Q. Just answer what I asked you.

A. Well, I have to check it. I don't recall.

The Court: He asked what table it was. Table 2.

The Witness: Now, will you repeat the question?

(The reporter read the last question.)

A. Yes, that is true. That was the year 1941.

Q. That's right. Now, was that one of the matters that you took into consideration in what you have stated here about the consideration that you gave to things in arriving at your opinion?

(Testimony of George L. Schmutz.)

A. The cost of manufacturing raws, not in that way. I just took it into consideration generally.

Q. In that way I am talking about.

A. No.

Q. You didn't consider that at all?

A. No, sir.

Q. Did you ever know of these particular facts shown on that table 2 that I have inquired about previous to today? A. Yes, I did.

Q. When did you know about it?

A. At the time they were made up.

Q. Then you knew it when you testified here as to value? A. I did.

Q. Now, among other things that were represented to Congress in the filing of this claim, Government Exhibit 1 for identification, is the statement that they had a heavy burden of 20 years rent liability and a 20-year pension program which they would have to go on, pay. Do you recall that statement [1449] about that?

A. I do not recall it, Mr. Rathbun.

Q. It is stated on page 10, referring to the statement that I have been reading from at different times:

“Nevertheless the property that remains to this company must of necessity be operated at a loss, as it is clearly demonstrated. Furthermore, it must assume the burden of 20 years rental, 20 years pension obligations, 20 years rentals on the land which it has under leases for which it has a continuing obligation, and certainly it desires to provide for

(Testimony of George L. Schmutz.)

the pensions which it has in good faith agreed to pay to its longtime employees.”

Did you read that statement?

A. If it is in there, I did read it.

Q. Then you knew about it when you gave your opinion?      A. Yes, I did.

Q. In this case. When did that pension situation go into effect?

A. I don't know anything about the pension situation.

Q. Did you ask about it?      A. I did not.

Q. Did you ask about their rent liability to see whether that's accurate, whether it's an accurate statement, 20 years?

A. I was informed that they had an obligation, a leasehold obligation, to continue it. [1450]

Q. Ordinary business houses have a pension scheme; they set aside monies year by year to take care of it; they accumulate a fund?

A. Some do and some don't.

Q. This one didn't?      A. I don't know.

Q. You don't know? Do you think it is good business to do it that way?

Mr. Vitousek: If the Court please, this is going pretty far afield, whether it's good business on pension matters. This is certainly not proper cross. And most of the morning we have been on matters that are not proper cross-examination, that I didn't bring out on direct. I hesitate to object, but when we get into whether it's good business or

(Testimony of George L. Schmutz.)

not on pensions, it's just wasting the time of the Court.

Mr. Rathbun: He said he took it into consideration.

Mr. Vitousek: He said he did not take it into consideration. He said he knew nothing about it.

Mr. Rathbun: Well, you know about that being stated, don't you?

Mr. Vitousek: Just a minute. I have an objection. Are you withdrawing that question?

The Court: It does seem to me that in the absence of the witness stating he knew about Honolulu Plantation Company's pension system that this pending question takes us pretty far [1451] afield as to what is good and bad pension practice.

By Mr. Rathbun:

Q. You knew about that statement before you testified as to the value in this case, did you not?

A. Well, I read the statement when I first saw it.

Q. Well, did you pay attention to it when you read it?

A. You mean did I read it word for word or did I believe it or what?

Q. Did you have it in mind when you testified to value here?

A. No, I did not have that in mind.

Q. You did not? All right, that settles it. Page 3 of your report in Government Exhibit 1 for identification states: Annual capital investments for the

(Testimony of George L. Schmutz.)  
years 1936, '37 and '38, a total of the three being \$1,325,977.76. Is that reflected at all in table 9?

The Court: Table 9 being what?

Mr. Rathbun: Beg pardon?

The Court: Table 9 being what?

Mr. Rathbun: In this document..

The Court: But I mean, what is the general nature of 9?

The Witness: Book value of property investment.

Mr. Rathbun: Invested capital.

A. The increase there shows \$515,000 as of the first of 1939, January 1, '39, as compared to January 31, '36. [1452]

Q. Let's take from '36 to '37.

Mr. Vitousek: Increase there? What are you referring to? He showed both.

A. According to table 9, labelled "Book Value Property Investment," the book value as of January 1, '39, or December 31, '38, as shown, is \$3,355,318.16. And as of January 1, '36, it is shown as \$2,840,716.28.

Q. Yes?

A. Making an increase for that three-year period of approximately \$575,000.

Q. Your statement was a million three hundred twenty-five, wasn't it?

A. That is correct. I did make that statement.

The Court: Is this a good stopping point for the last recess?

Mr. Rathbun: Yes.

The Court: All right.

(A short recess was taken at 12:10 p.m.)

(Testimony of George L. Schmutz.)

After Recess

By Mr. Rathbun:

Q. Calling your attention again to table 9, Government Exhibit 1 for identification, at the bottom of that table there appears, Average per irrigated acre over 3196 acres, as of January 1, 1945, \$746.50; 5252 acres, as of January 31, 1939, \$454.25. By what process were those figures of \$746.50 [1453] and \$454.25 arrived at?

A. By division into this figure just above, called "Net Permanent Improvements."

Q. That's as of January 1, '45, is it?

A. That is right.

Q. To arrive at the per ton, or per acre rather, cost or burdened, shouldn't you divide the 5252 into the capital invested in the year '39?

A. No, I don't think so.

Q. You don't. A. No, sir, I do not.

Q. If you did that, it would make a big difference, wouldn't it?

A. If you were to use '39?

Q. Yes.

A. —Instead of—it would make a difference, there is no doubt about that.

Q. It would make a big difference, wouldn't it?

A. Well, I haven't figured it out. It would make some difference.

Q. The way I figure it, it would make \$170 per acre difference, at least.

A. In the bottom line figure?

(Testimony of George L. Schmutz.)

Q. Yes, these figures here. (Indicating in exhibit for identification.) ]1454]

A. Oh, in the other figures?

Q. Yes. A. It may. You figured out—

Q. Where do you know of in the Territory of Hawaii of any cane land being sold for a thousand dollars an acre? A. I don't know of any.

Q. Do you know of any being sold over \$650 an acre, strictly as cane land?

A. No, I don't know of any sales.

Q. You don't know anything about the price of it? A. That is right.

Q. Did you make any investigation on that subject? A. No, I did not.

Q. You make the statement on page 4 of your statement in Government Exhibit 1 for identification:

“By way of summation, prior to the decimation of its sugar cane lands the company was a financially sound enterprise with a considerable capital investment in land, plant, water supply and irrigation system, and other facilities, that enjoyed annual net earnings adequate to support the capital structure, and was highly regarded by the public, as evidenced by the public's valuation of its shares.”

Do you remember that statement? That is your statement.

A. Well, if that is there, I made the statement.

Q. Well, did you have it in mind when you made your [1455] valuation in this case?

(Testimony of George L. Schmutz.)

A. I did.

Q. On table 1, attached to Government Exhibit 1 for identification, under the heading of per share in dollars is set forth, from the year 1920 to and including 1944, certain figures. Are those figures the stock-quoted price at those times?

A. Those were average yearly selling prices.

Q. On the market? A. On the market.

Q. The stock sold for in 1932 for \$10.60 a share then, didn't it? A. That's right.

Q. And so increases down the line until you get to 1936 when it went to \$30.12 a share?

A. That is right.

Q. Then it goes steadily downward from then on, doesn't it? A. It does.

Q. It goes down \$8.00 a share between 1937 and 1938? A. Yes, \$8.75.

Q. It goes down \$7.00 a share, lacking 12 cents, between 1938 and '39? A. Six dollars.

Q. Well, put it six dollars. [1456]

A. \$5.88.

Q. All right. A. The figure.

Q. And between the years, from 1939 to 1940, it went down? A. \$4.62.

Q. And in 1942 it went down to \$7.00?

A. That is right.

The Court: Down to \$7.00?

Mr. Rathbun: Down to \$7.00.

Q. And in '43 it came up to \$9.87; and in '44, \$10.25. Is that right? A. That's right.

Q. Are those the figures that you had in mind

(Testimony of George L. Schmutz.)

when you made the statement that it was highly regarded by the public?

A. Yes, that's what I had in mind.

Q. Now, you said something about the good management of this company in your statement, did you not?

A. I do not recall whether I said that or not. If it is there——

Q. You did.                   A. ——I did.

Q. What did you mean by that use of the words "good management?" [1457]

A. I meant an operation in which the management was able to get a reasonable degree of efficiency out of the materials at hand.

Q. Anything else?

A. And show a fair return upon the investment—yes, of course.

Q. Well, why did you hesitate so long? Management is an item——

Mr. Vitousek: Mr. Rathbun, will you point out where it is pointed out as to the management? It is in the president's report?

Mr. Rathbun: Page 5 of the President's statement, Honolulu Plantation Company presents this picture, "By efficient and far-seeing management and the judicious use of large sums of stockholders' money . . ."—did certain things.

Mr. Vitousek: If the Court please, the question stated what this witness had in his report; stated this witness had it in his report. That's what we have been talking about, and that's what I object to.

(Testimony of George L. Schmutz.)

**Mr. Rathbun:** I was doing it from memory. It doesn't matter which report, as far as I'm concerned. Do you understand now that it is? I think I can find it in his, but I am not going to take the time.

**Q.** You understand that I am referring now to what the president said? [1458] **A.** I do.

**The Court:** Would your answer be the same?

**The Witness:** The answer would be the same.

**Q.** Now, management. Just what significance does efficient management have as far as valuing the property of this company is concerned, as you have valued it?

**A.** Well, the process of valuation contemplates that property shall not be penalized because of poor management, inefficient operations. That is true of apartment houses, office buildings, and any other type. The question to be answered by the valuator is, what is the property reasonably capable of doing under ordinarily fair management, making uses of the facilities which are available?

**Q.** Keeping operating costs down would be one of them, wouldn't it?

**A.** Keeping operating cost down and keeping income up to what might be considered the normal level for that particular type of enterprise.

**Q.** That is the thing that the average person would be most interested in, wouldn't he, getting an income out of it?

**A.** That is the only reason anybody buys anything that is for income.

(Testimony of George L. Schmutz.)

Q. Yes, that's right. Now, management is of a nature that—its relationship to any one company, the operation of it, is somewhat fluctuating, isn't it? [1459]

A. I don't understand.

Q. Well, a good management might make money and a bad management might lose money for the same plant?

A. For one or two years, yes, but not over any period of time, because they'd get changed managers.

Q. I'm talking about the management up to the president, the owner of the company.

A. Well, the success of the enterprise really settles in the manager on the property.

Q. Well, never mind——

A. Spending money in doing——

Q. That isn't my question. Degrees of management so far as being efficient or inefficient vary, don't they?

A. They vary but tend to level out.

Q. One man might not make us money due to his lesser ability than another man with the same plant, isn't that true?

A. That is true.

Q. Did you consider this a good and efficient management in arriving at your values in this case?

A. I felt it was a normal management.

Q. Did you agree to the statement that the president made, that it was efficient and far-seeing?

A. I think the management was efficient. I think it was far-seeing.

(Testimony of George L. Schnutz.)

Q. That was your attitude when you gave your opinion [1460] of value here?

A. I have that in mind, yes.

Q. One of the items. Therefore, just what someone could make out of a piece of property, a plant, would depend upon that person's ability to operate it, wouldn't it? A. Naturally.

Q. And that's speculative, isn't it?

A. I don't get that at all.

Q. You don't get it at all? A. No, sir.

Q. If you are trying to arrive at how much anybody could make out of a plant, and you had one man over here and another one over here, as between the two of them, knowing their abilities or the lack of it, you would say that, or to attempt to say that what either one of them would make out of that plant, knowing about their management yourself and their ability—it would be uncertain and speculative, wouldn't it?

A. Well, certainly it would be uncertain. You never know what any man can do until it is done.

Q. That's right. O.K. That's one of the things you took into consideration in arriving at your value, wasn't it?

A. Yes, but for whatever weight it might have been given.

Q. Well, I don't know what weight it might have been given. You used it as one of the considerations. [1461]

A. I considered a great many things. Some of them I gave weight to and some I didn't.

(Testimony of George L. Schmutz.)

Q. I didn't ask you that. Now, I don't blame you for not pinning yourself down to any one thing, but please answer the question, will you?

A. I proceeded upon the theory that over a period of years the company had had normal management.

Q. Then you did take that into consideration in arriving at your value? A. I did.

Q. You stated in your report in connection with Government Exhibit 1 for identification on page 19, "As a result of the takings there followed a loss in the value of much of the aforesaid physical property." What did you mean by that?

A. I meant that the property would not sell for as much as it previously would have sold for.

Q. You didn't mean to say that the taking of this property affected any of the, physically affected any of the land or mill or machinery, did you?

A. I meant that it affected them value-wise.

Q. From the standpoint of price?

Mr. Vitousek: He has repeated the same line of questions as earlier this morning, about the physical aspects of the mill, as the Court will recall. He said he meant the value.

Mr. Rathbun: I didn't ask any questions directed to the [1462] question that I have asked now.

The Court: But not in relation to his statement in the Congressional claim. May we have the last question, Mr. Reporter?

(The reporter read the last question.)

(Testimony of George L. Schmutz.)

Mr. Rathbun: I'll ask another question.

Q. You said further because of the loss of land—this goes on from what I read there—“ . . . because of the loss of land to which they previously furnished irrigation water and/or for the reason that the remaining wells are more expensive to operate because of increased pumping costs to adequately serve the lessened and higher area to be irrigated;” do you remember that statement?

A. If it's there, I made it.

Q. Well, it's there, I guarantee you. Now, when you said it would be more expensive to operate, the only significance that that had in connection with value was that it would reduce the possible earnings?

A. It would reduce the amount of earnings which would be available for interest on the fair value of the property.

Q. And that's one of the things that you considered in arriving at your opinion of value here, was it not?

A. That was one of the things that I considered, yes.

Q. You further said, “Also a portion of the investment in the physical properties aforementioned is dissipated because [1463] of the resulting excessive cost in relation to the service rendered.” Your answer would be the same in regard to that statement?

A. That is true.

Q. You said on page 20, “The numerous losses of land have resulted in the permanent impairment

(Testimony of George L. Schmutz.)

of the ability of the remaining property to produce net earnings commensurate with the residual value as in the past, assuming compensation is paid for the shrinkage mentioned in the preceding paragraph." Now, is that your feeling about that today and was it when you testified to value in this case?

A. Will you reread it? What was that shrinkage in the preceding paragraph?

Mr. Rathbun: I'll read it again. I think he was mixed up.

Q. "The numerous losses of land have resulted in the permanent impairment of the ability of the remaining property to produce net earnings commensurate with the residual value as in the past, assuming compensation is paid for the shrinkage mentioned in the preceding paragraph."

A. What is that shrinkage in the preceding paragraph? Let me look at that, Mr. Rathbun. Maybe I can answer you, to save time.

Q. My question to you is whether you made that statement first. Do you remember it? (Handing document to the witness.) [1464]

A. Yes, sir, I did make it.

Q. You base your opinion in this case on the fact that numerous losses of land have resulted in permanent impairment of the ability of the remaining property to produce net earnings commensurate with the residual value, did you?

A. No, I didn't base my opinion. I took that into consideration but I didn't base my opinion.

(Testimony of George L. Schmutz.)

Q. Well, how did you take it into consideration if you didn't base your opinion on it? Will you explain that phenomena to me once?

A. As I tried to tell you before, what I did was to make a study of the over-all picture. Now, this is a discussion of some of the minutia which go up to make the over-all damage, and I didn't make any separate computations on these items because of increased production cost or decreased capital investment, or that's the overcapacity of the property and the shrinkage in value occasioned thereby. I didn't break any of those things down and then add them up and say that all of these add up to a certain amount of money.

Q. All right, are you through?

A. I am through.

Q. Did you consider it in arriving at your opinion?

A. I didn't—well, yes, I considered everything.

Q. That included, what I read you?

A. I considered that, yes. But that wasn't the way I [1465] reached my opinion.

Q. Well, how you reached your opinion, I don't know. But you considered it in arriving at the opinion you testified to in this case?

A. I considered it was one of the elements in there that was reflected by the condition which I found.

Q. You further said, "Briefly the reasons for this statement lie in the drastic decline in earnings which are caused by (1) the rapid increase in unit

(Testimony of George L. Schmutz.)

cost (e.g., per ton) due to decreased production, and (2) because of the decrease in volume of production." Do you remember that?

A. Well, if it is there, I said it.

Q. Well, it is there, I guarantee you. Now, did you consider that situation in arriving at your opinion of value in this case?

A. Yes, I considered that. But I didn't use it as the basis of my opinion.

Q. But you considered it? A. I did.

Q. After considering all of these things you then arrived at your opinion of value, is that what you try to say?

A. No, that isn't what I am trying to say.

Q. No? What's wrong with that statement?

A. What I'm trying to say is that I made an estimate of what the value of this property was as I saw it on one date and then made another estimate of the value of the property as [1466] I saw it on another date, irrespective of all of these conditions which you speak of, irrespective of those I came to the conclusion that there was a certain shrinkage in the value which appeared to be approximately a thousand dollars an acre.

Q. All right, are you through?

A. Yes, sir.

Q. You said further on page 22, "Obviously, therefore, Honolulu Plantation Company will be forced to operate at about 50% of its normal capacity (30,000 to 15,000 tons). The effect of this, as elsewhere herein shown, will be to greatly in-

(Testimony of George L. Schmutz.)

crease the per ton cost of production and greatly reduce the number of tons that can be produced." Did you have that in mind and consider it in arriving at your opinion?

A. In the same way as I have explained before, the answer is yes.

Q. All right. You said further, "At present, and as a temporary war emergency measure the Company has been able to purchase outside raws to take the place of the supply from lands expropriated by the Government. But, this substitution of supply does not leave the company in as good a pecuniary position as if the supply were produced on the Company's lands." Do you remember that statement?

A. I wouldn't, but if I did make it, I did.

Q. And you considered that in arriving at your opinion in this case? [1467]           A. I did.

Mr. Rathbun: I think that's all, your Honor.

The Court: Redirect?

Mr. Vitousek: If the Court please, we have a lot of notes to go over in this matter. I suggest we take an adjournment at this time.

The Court: All right. I think that might be profitable. We will adjourn until nine o'clock tomorrow morning.

(The Court adjourned at 12:50 o'clock, p.m.)

Honolulu, T. H., December 12, 1946

The Clerk: Civil No. 514, United States of America versus 257.654 acres of land, and Civil Nos. 521, 525, 527, 529, 532, 533, 535, 536, 540, 544, 548 and 684, for further trial.

The Court: The parties, I presume, are ready?

Mr. Vitousek: Ready.

The Court: And you, Mr. Schmutz, are mindful of the fact that you are still under oath and are about to be examined on redirect?

The Witness: Yes, sir.

The Court: You may proceed.

### GEORGE L. SCHMUTZ

a witness in behalf of the Defendants, having previously been sworn, resumed and testified further as follows:

#### Redirect Examination

By Mr. Vitousek:

Q. Mr. Schmutz, why did you come to Honolulu in 1940?

A. The primary purpose was to deliver a series of lectures on valuation at the request of the Honolulu Realty Board.

Q. While you were here for that purpose, you talked, had that luncheon you mentioned with Mr. Spalding? A. I did.

Q. Now, Mr. Schmutz, you testified, as I recall it, [1469] that you were familiar with the annual reports of the Honolulu Plantation Company, referring to Exhibit 13-A to T inclusive?

(Testimony of George L. Schmutz.)

A. I did.

Q. Turning to 13-T and calling your attention to a blue printed sheet and series of figures attached to the end of that report called "Exhibit H" of the report itself,—that is, when I say "Exhibit H" I mean that "Exhibit H" is attached to Exhibit 13-T that has been introduced in evidence in this case—in general what does that show?

Mr. Rathbun: I object to what it shows. It speaks for itself, if your Honor please.

The Court: Isn't that so?

Mr. Rathbun: That would be his conclusion.

Mr. Vitousek: Well, if the Court please, it speaks for itself, true, but it is simply preliminary to the other question. I could recite what it shows and I think it is proper if the witness knows that it is proof of his knowledge what it really means. He said he is familiar with them. And if he is, he ought to be able to say what they refer to.

Mr. Rathbun: "What it really means" is outside of the province of this witness; it is for your Honor to say.

Mr. Vitousek: If the Court please, this witness testified that he based his information insofar as the financial and other affairs of this company were concerned upon these reports. Now, there was a lot of discussion yesterday about [1470] Government's Exhibit for identification in the cross-examination. This witness, however, said he based his securing of information from the records of the company and the reports of the company. Now, if

(Testimony of George L. Schmutz.)

he did, and he has testified here as an expert, if the Court please——

The Court: Are you referring to the conflict between the Congressional claim which is marked for identification here and the figures shown in these annual reports; is that what you are getting at?

Mr. Vitousek: Later we will get at that, if the Court please.

The Court: My recollection, on the basis of what you have last said, was not that the witness testified that he got figures from these annual reports as much as he said that they were figures supplied to him by the company.

Mr. Vitousek: On the compilation of that exhibit, but on his testimony here in court, in his testimony as to his opinion of the value, he based it on the reports, not on the figures shown in this exhibit. That is where the confusion has arisen. That's what we desire to bring out on redirect.

The Court: I'm not too sure. It seems to me he said he considered them, but we are getting apart from this.

Mr. Vitousek: I don't say based his valuation; I say secured his information. He said he didn't base his valuation on any one particular. [1471]

The Court: Well, so far as this particular objection is concerned, I think that portion of that exhibit 13-T does speak for itself. The witness can say whether or not he is familiar with it and knows what it is.

(Testimony of George L. Schmutz.)

Mr. Vitousek: The Court sustains the objection?

The Court: Yes, I think it is technically correct.

By Mr. Vitousek:

Q. I will hand you, Mr. Schmutz, Exhibit 13-T and call your particular attention to a portion of Exhibit 13-T which is marked "Exhibit H," and ask you if you are familiar with the contents of that and if you were at the time you prepared, at the time you arrived at your opinion as to value?

A. I was familiar with it.

Q. Now, I call your attention particularly to the first part of that exhibit, which shows a summary of the lessors and leases, dates of expiration, annual rentals, and general location of the leased areas. Are you familiar with that?

A. I am.

Q. And were you at the time you arrived at your opinion as to value?

A. I was.

Q. Yesterday, Mr. Schmutz, counsel for the Government asked you questions regarding Exhibit 9-K, being a Damon lease, dated June 27, 1927, and two letters attached. Do you remember those questions? [1472]

A. I do.

Q. Now, as I recall, one of the questions was based on a statement that this lease, 900 acres, of Damon land—do you know whether or not Damon land had been taken in previous takings?

A. I understand that there had been some of the land taken previously, which is included in that lease.

Q. Is included in the descriptions?

(Testimony of George L. Schmutz.)

A. Included in the descriptions of the lease.

Mr. Rathbun: Well, I object to that. I don't know what "previously" means.

By Mr. Vitousek:

Q. Well, what do you mean by "previously?"

A. Prior to the takings involved in this consolidated action.

Q. I ask you whether or not in your answer to that question—I'll withdraw that. As I understood, you said that there were some 1087 acres that you considered having been taken in this particular consolidated trial? A. That is correct.

Q. Now, assuming that the area of cane land taken in this particular—I'll withdraw that. Assuming that the area of cane land involved in the Damon Estate holdings which were taken in these particular proceedings was 595.01 acres, and assuming that this lease assumed by the Government was not [1473] involved, was not valid, would that make any difference in your answer?

A. It would have.

Q. Well, what would the difference be?

A. My opinion of the value before and my opinion of the value after would have been reduced approximately \$595,000.

Q. Mr. Schmutz, you were asked yesterday concerning some compliance payments. In connection with these compliance payments, do you know whether or not the Government considered them income for the purpose of Federal taxation?

A. I am informed that it is taxable income.

(Testimony of George L. Schmutz.)

Q. Now, in connection with this exhibit for identification, and particularly to table 1——

The Court: What is the number on that?

The Clerk: A for identification.

Q. ——Government Exhibit A for identification, particularly to table 1 forming a part of that——

The Clerk: Excuse me, it's 1 for identification.

Q. I'll withdraw the question. I refer you to Government's 1 for identification, particularly table 1 of that exhibit for identification, and on table 1, particularly column 6, which is headed "Net Income Available for Interest on Investment," as I understood your testimony—if not, will you please correct me?—if in your opinion the figures there shown are incorrect? [1474]

A. That was my testimony.

Q. Yes? A. Yes, sir.

Q. And in your opinion would they be more or less?

Mr. Rathbun: Just a moment, please. My question was directed to that document, not to any ideas that this man may have had about a different method of bookkeeping. This is the bookkeeping done by this company and that's what I examined him on. This man is in no position to revalue their books or change their method. I didn't have any such question.

Mr. Vitousek: Counsel endeavored yesterday to show that these exhibits were made by this particular individual, and he based his questions on this exhibit which the individual said repeatedly yesterday in regard to particular figures, not the

(Testimony of George L. Schmutz.)

columns as a whole, but that they were incorrect. Now, we are endeavoring to show they are incorrect as a whole. We never said that he based his opinion on this figure. But I don't know the purpose of bringing this in. Certainly they cannot bring it into the record and then foreclose us from showing it is incorrect. This witness is the one we are concerned with.

The Court: May we have the last question, Mr. Reporter?

(The reporter read the last question.)

The Court: It seems to me he may be able to explain why in his opinion the figures are incorrect, but as to whether or [1475] not the net income available for application to the investment should be more or less is entirely a different question. I think the objection is good. I will not allow that particular question but I will allow him to explain or give his reasons as to why he believes those figures are incorrect.

Mr. Driver: Your Honor, may I say something on that? This witness used these figures in an effort to justify his position in the Congressional claim. Certainly he can't be permitted to impeach himself, if that's what Mr. Vitousek is after. He is now being asked whether the figures he relied on are incorrect.

Mr. Vitousek: Now, if the Court please, we might as well get this matter straight. The witness is being examined here in regard to a question before this Court, which is different from the ques-

(Testimony of George L. Schmutz.)

tion before Congress. This witness made certain sheets in this report, and we propose to show that he didn't make certain—as I understood the examination yesterday did not go to the extent of showing that he relied on these figures but endeavored to leave the inference that he did, although he repeatedly stated he didn't. We are entitled on redirect to clear that up. We are not impeaching this witness before this Court. This matter was submitted to Congress, but we don't know whether this book was submitted to Congress because it's not been shown yet that it was. And I am prepared to show that certain of these sheets were changed before submitted. This witness was employed, as he stated, to assist [1476] in preparing it, but he wasn't the final authority. Now, when they are examining him on this in a trial before this Court, not Congress, he is entitled to show what he actually considered when he placed his opinion of value on this property.

Mr. Rathbun: And our point is that he placed an opinion of value on this property on a different basis than he did there, of course, but it goes to credibility. He made a different statement at a different time. Whether they filed it or wheher they never filed it, he admitted that he knew about it and he knew that his part in it was to prepare it and assist in its preparation for the purpose of being filed. We don't care if they never filed it. It goes to credibility.

Mr. Vitousek: That's our very point. It goes

(Testimony of George L. Schmutz.)

to credibility. If it goes to credibility on redirect, we can have the witness explain it.

The Court: I have already ruled that he may explain as to why in his opinion these figures are incorrect.

By Mr. Vitousek:

Q. Will you explain why in your opinion the figures shown in this column underneath income available for interest on investment, on table 1 of Government Exhibit 1 for identification, are incorrect?

A. I thought that I had explained that rather carefully yesterday. As regards the year 1943, there was transferred [1477] to surplus the bottom line figure for 1943, the figure \$190,302.78. That was after there had been deducted farther up in the sheet the amount of \$189,305.92 for depreciation, and the further amount of \$44,210.62 for amortization of the capitalized value of leases which had been set up on the books. In addition to that, in the statement there is also shown some other pluses, that is, income and expenses which, while truthfully received, are truly spent on an accrual basis, were not necessarily reflective of the average earnings of this property. One of those was loss on equipment discarded, of \$3,555.65; second was damage to growing crops, \$440.40; the third was the sale of labor and supplies to others in the amount of \$14,706.68; another was liquidated damage to fields, \$2,550 even; another was the sale of second-hand bags, \$7,467.86; another was profit on the

(Testimony of George L. Schmutz.)

service station, of \$2,021.23; another was crop loss on land which was reclaimed by the Navy, \$3,815.19; another was loss on crops because of fields converted, of \$662.81. Now, it is my position that while those books are correct from the standpoint of bookkeeping, yet they do not reasonably reflect the average value of the property for purposes of valuation because of the presence of non-recurring items. And when an appraiser makes an appraisal of a property or when he investigates an operating statement, invariably it becomes necessary to reconstruct the operating statement to get his income and expenses on what might be considered a long-term [1478] basis instead of taking care of the fluctuations year by year, or to eliminate the unusual features which are present.

For that reason I say that this document here, this column, does not truly reflect what might be called the reasonable income from operations.

Q. Now, Mr. Schmutz, were you able to secure from these annual reports the information to make this reconstruction of the figures as you used in your appraisal?      A. I did.

Q. So every items compares in these reports?

A. Every item affecting that column is found in the annual reports of the company marked Exhibit 13.

Q. And, Mr. Schmultz, assuming a willing purchaser of this property, willing to purchase it, pay cash for it, was examining the property for that purpose, had examined these reports, could he ar-

(Testimony of George L. Schmutz.)

rive, did the reports contain information enough to permit him to reconstruct any figures he wants according to his opinion to reflect the value?

Mr. Rathbun: I object to that as argumentative entirely. He can read the reports and call the conclusion himself.

The Court: I think that is right.

Mr. Vitousek: If the Court please, whether this is argumentative or not, I don't believe it is, but yesterday we spent a whole day here trying to show that the public had been fooled by these reports. It is quite true that the Court could [1479] go through these reports. On the other hand, this is a witness who is called as an expert to testify in regard to fair value. He has a right to testify as to what information was available, what information was available from these reports to anyone making a similar investigation. In other words, there is nothing hidden; it was all on the up and up. The matter of opinion as to how the items should be construed, whether they are non-recurring items of income, should be considered in trying to arrive at what is a stable income. Those are all matters for the man making the value to consider. But that they did all appear in the reports is the question we are entitled to have answered in view of the cross-examination.

The Court: Well, it's already been answered that those reports being public are available to anyone, so that any buyer would have access to them and can do such figuring on the basis of these reports as he saw fit to do. I think that is obvious.

(Testimony of George L. Schmutz.)

Mr. Vitousek: Well, then, that is sufficient, if the Court please. That's what we are trying to show, that all these figures can be found in the report. Now, they can put them around any way they want to, according to the opinion of a particular individual. They are all here.

The Court: All these figures are?

Mr. Vitousek: These figures being the figures that we referred to of income, whether non-recurring or otherwise, the [1480] witness has just testified to.

The Court: In his last answer?

Mr. Vitousek: In his last answer. (To the witness): Your last answer related to what year when you were giving the differences in your opinion?

The Witness: That particular set of differences that I referred to was the year 1943.

The Court: Is it true of all of the years?

Q. State whether or not that would be true of all other years involved?

Mr. Rathbun: Well, I make the same objection.

The Court: Same ruling.

Mr. Rathbun: It hasn't been answered yet.

Mr. Vitousek: Well, we can take it through year by year, if the Court please. But I would like to ask a question to save time, to show that all the other reports would show, could be used for the same purpose.

Mr. Rathbun: And they speak for themselves.

By Mr. Vitousek:

Q. What year did you talk about?

(Testimony of George L. Schmutz.)

A. 1943.

Q. Well, we'll take it year by year. Commence with the first.

Mr. Rathbun: What was the question, please?

Mr. Vitousek: There's going to be a question in a minute [1481] if you will just let me ask it.

Mr. Rathbun: I will, but you asked one and it hasn't been answered yet. I'm going to follow it up.

Mr. Vitousek: What is before the Court? I don't know of any question.

Mr. Rathbun: The one that I made the objection to.

The Court: It is withdrawn in view of what you said, and he is going through year by year.

Mr. Rathbun: All right. I didn't hear him withdraw it.

By Mr. Vitousek:

Q. Beginning with the year 1928, Mr. Schmutz, I believe that was where we started. At any rate, we will start there today. Will you refer to the figures under column 6, table 1, of Exhibit 1 for identification of the Government, and I will ask the same question regarding that particular year as was asked regarding the other year you have testified to?

Mr. Rathbun: Now, I object to that. There were several questions asked. He ought to ask a specific question so that we may meet it.

Mr. Vitousek: If the Court please, I will ask the reporter to go back and read that particular question. I want to frame it exactly the same.

(Testimony of George L. Schmutz.)

(The reporter read the previous question referred to.)

Mr. Vitousek: What I was going to ask was leave of the Court to withdraw this witness for a moment and put Mr. Austin on. Do you remember, he was still on redirect? I had one [1482] more question, and he is in the courtroom and he is busy and——

The Court: Wasn't he to be recalled on these annual reports?

Mr. Vitousek: In connection with this tonnage, if the Court please, to straighten it out. I think one question can answer the whole thing.

The Court: All right, you may.

Mr. Rathbun: If your Honor please, I want to object to that. This is a different sort of a witness. This is an expert. Mr. Austin is mere detail what he was testifying to.

Mr. Vitousek: I'm not going to ask——

Mr. Rathbun: I know but I object to withdrawing him at this time.

Mr. Vitousek: All right. If the Court please, would it be permissible for me to excuse Mr. Austin and telephone him to come up? He has an important meeting at ten o'clock.

The Court: You may.

Mr. Vitousek: Mr. Austin, you can be excused. We will telephone you when you are needed. Counsel objects to you going on now.

Mr. Rathbun: Counsel doesn't object to his go-

(Testimony of George L. Schmutz.)

ing on at all. He objects to interrupting the examination of this witness.

The Court: Proceed.

By Mr. Vitousek:

Q. What in your opinion, Mr. Schmutz, or will you give [1483] an explanation of what in your opinion the changes should be in the column I referred to, column 6 of table 1, Government Exhibit 1 for identification, for the year 1928 and subsequent years?

Mr. Rathbun: I object to that for the reason that he was examining him upon that document as it is. That was made up by the Honolulu Plantation Company. The questions that were asked were directed to him. Now, just what purpose this is to be for, it is not redirect in the next place. What purpose there could be in letting this man reconstruct some books, I can't see. It is incompetent, it is immaterial how he might keep books, if that's what he's trying to tell us now.

The Court: This question is a little different than the other one. I have ruled on that one but this question as stated is a little different than the one that related to 1943.

Mr. Rathbun: Just a little.

The Court: I have ruled basically that this man, having testified that the figures in this table 1 of the Congressional claim, Exhibit 1 for identification, were incorrect, that he was entitled to explain why they were incorrect. So I should think the question——

(Testimony of George L. Schmutz.)

Mr. Vitousek (Interposing): Well, if the Court please, we are not trying to vary the Court's question. We will confine it to just that one.

The Court: Why don't you ask him under that ruling why [1484] this particular figure in 1928 in his opinion was incorrect?

Mr. Vitousek: That's what I was going to ask.

Q. Why is this particular figure, referring to the exhibit we have been talking about for identification, for the year 1928, in your opinion incorrect?

Mr. Rathbun: I object to that for the same reason, if your Honor please. He is not saying it is incorrect as set forth. By another method of book-keeping he is going to say that he wouldn't have made it that way.

The Court: We will see. The objection is overruled. You may have an exception to this line.

A. It would be for the same reasons that I mentioned before as regards the year 1943, and that reason goes to all of these years.

Q. By all of these years you mean the years shown?

A. Well, from '28 to '43, both inclusive.

Q. On table 1 of Exhibit 1 for identification of the Government? A. That is correct.

Q. Yesterday, Mr. Schmutz, you were shown table 9 of Exhibit 1 for identification of the Government. I will show that to you again and ask you if you prepared that table?

(Testimony of George L. Schmutz.)

A. No, this table was prepared for me but I am acquainted with it.

Q. Now, I will turn back to page 3. [1485]

The Court: Of?

Q. Page 3 of the introductory remarks of Exhibit 1 for identification. That was called to your attention yesterday? A. It was.

Q. And particularly it was called to your attention annual capital investments, this following language: "The annual capital investments were as follows: year 1936, \$345,850.33." Do you recall that? A. I do.

Q. "1937, \$484,926.44"? A. I do.

Q. And "1938, \$495,299.00"?

A. That's two hundred dollars, ninety-nine cents.

Q. \$495,200.99? A. That is correct.

Q. Where did you get those figures?

A. From the annual reports of the Honolulu Plantation Company, marked Exhibit 13.

Q. Well, would you look at this exhibit and see if they appear? And if so, in what years? (Handing small book in evidence to the witness.)

A. May I have the question?

(The reporter read the last question.)

The Court: This exhibit being what?

Mr. Vitousek: The annual reports, 13. [1486]

A. I have before me a report for the year 1936, Exhibit 13-M, which carries the title "Permanent Improvements and Property Accounts, December 31, 1936, Exhibit A;" on the bottom portion of that

(Testimony of George L. Schmutz.)

page is shown additions, \$345,850.33, which is the same figure as shown in this claim to Congress marked Exhibit 1, I believe, for identification. In the report, of the annual report of Honolulu Plantation Company for the year 1937, marked Exhibit 13-N, on the page headed "Permanent Improvements and Property Accounts, December 31, 1937, Exhibit A," in the bottom portion of that page is shown additions, \$484,926.44. That is the same figure which is shown on Exhibit 1 marked for identification, as capital expenditures for that year. In the 1938 annual report of Honolulu Plantation Company marked Exhibit 13-O, on the page headed "Permanent Improvements and Property Accounts, December 31, 1938, Exhibit A," near the bottom of that page is shown additions, \$495,200.99. That is the same figure also shown on Exhibit 1 for identification.

Q. Mr. Schmutz, you have testified in your direct examination on a question about making a number of appraisals? A. I have.

Q. I ask if in your experience you have ever come across a practice of putting an amount representing an unliquidated damage claim on the books of the company?

A. I have never seen any such accounting.

Q. And you didn't find it on the books of this company? A. I did not. [1487]

Mr. Driver: You said liquidated?

Mr. Vitousek: Un liquidated.

The Court: Unliquidated.

(Testimony of George L. Schmutz.)

Q. In regard to the use of the meaning of the words used yesterday, I'd like to have explained further what is meant by capital invested?

A. Capital invested——

Mr. Rathbun: I object to that as not proper redirect. It has all been gone over. There is nothing on cross-examination that causes that to be necessary in redirect.

Mr. Vitousek: If the Court please, yesterday counsel used the term "capital invested" as meaning value, and we are entitled on redirect to clear up what that phrase it, the meaning that is in the mind of this witness.

Mr. Driver: He has already testified.

Mr. Vitousek: Am I going to have two counsel against me now?

Mr. Rathbun: He didn't do it until we brought it out in cross. But it is only necessary in connection with these books; that's where the term is used in these exhibits. The Honolulu Plantation defined what they meant by it by the figures they put under it.

The Court: I have a recollection that on cross-examination at one time the witness did give us his definition of what he meant by capital investment.

Mr. Rathbun: I'll give you substantially the words the way he gave it.

The Court: I'm sure I have a note to that effect.

Mr. Rathbun: Capital investment means money, invested in enterprise, is what he said.

Mr. Driver: I have a note on it and it's on

(Testimony of George L. Schmutz.)

direct examination and it follows shortly after his opinion of values in dollars.

The Court: Yes, there is a note here among my papers that on direct examination he defined capital investment as meaning the money put into the business. I seem to think also that on direct examination he distinguished between what was the capital investment and what would be new capital if a buyer purchased it and distinguished between cost and value. I seem also to think he defined the term on cross-examination, although on that point I may be in error.

Mr. Vitousek: If the Court please, it was repeatedly used in cross-examination by examining counsel.

The Court: Well, you simply want him to re-define or enlarge on his definition?

Mr. Vitousek: Let's clear up what was meant in cross-examination yesterday, if the Court please.

The Court: What he meant by it or what the questioner meant by it?

Mr. Vitousek: I don't know what the questioner meant by [1489] it. I want to know what he meant by it in the various answers he gave.

Mr. Rathbun: It's perfectly obvious what he meant by it because every time he was asked it was in connection with these exhibits gotten up by the Honolulu Plantation Company.

The Court: Well, I think your question that is pending is, Please enlarge on your definition of

(Testimony of George L. Schmutz.)

capital investment, or redefine it, something like that. I don't think that question is proper.

Mr. Vitousek: Well, I'll withdraw that question, if the Court please.

Q. In connection with cross-examination yesterday, or certain questions asked you concerning capital investment, what did you mean or have in mind as a definition of capital investment when you answered that?

Mr. Rathbun: I object that it is not proper redirect. The questions that were asked yesterday were directed to exhibits that provoked any—that define capital investment. The Honolulu Plantation defines them. If he is going to vary that, we will get into a field of letting this gentleman write their books and make the construction, contrary to their own documents.

Mr. Vitousek: If the Court please, we are not talking about their own documents or anything else. We are talking about the answers given by this witness. It is very clear what the books of this company show as the capital investment. [1490] And the witness has explained that it was put up as a cost for the year 1932 and depreciated since that date. That's what it shows.

The Court: Your question is directed to having him tell us now what, in answering those questions yesterday, he meant when he used the term "capital investment?"

Mr. Vitousek: That's right.

The Court: The question may be answered, and

(Testimony of George L. Schmutz.)

you may have an exception. Do you have the question in mind?

The Witness: Yes, your Honor.

A. Briefly, the words "capital investment" as applied to these reports, means the amount of money which the Company has invested at whatever date it was invested, less depreciation and plus additions to capital.

Q. Well, coming down to specific instance, suppose, assume for the sake of this question, that I purchased an automobile for five thousand dollars, what would be my capital investment relating it to the definition you termed?

A. Your capital——

Mr. Rathbun: I object to that as having nothing to do with this question in this case whatsoever. We have no such situation. It is not proper re-direct.

The Court: Overruled.

Mr. Vitousek: I'll withdraw the question.

Q. Assuming that I purchased the property you value [1491] here at \$3,100,000 plus, what would be my capital investment at the figure you placed on the value?

A. Your capital investment——

Mr. Rathbun: Just a minute. I object to that as incompetent, irrelevant and immaterial and not proper direct and it calls for a conclusion. It sheds no light on the case under the issues.

The Court: You dropped your voice in the last part of that question. I didn't get the last part.

(Testimony of George L. Schmutz.)

(The reporter read the last question.)

The Court: What do you mean by the last part of that question?

Mr. Vitousek: If the Court please, I want him to give an example relating to what his meaning of capital investment is. In other words, he has placed his value on this property after the taking, the exact figures I don't recall but three million one——

The Court: Well, I understand what you are after, but I don't understand the last part of your question. Additionally, on direct examination, as we just reviewed our notes here, we find that the witness has already distinguished between what would be the capital in an object and what would be the capital if a person bought it. I think he has already illustrated it.

Mr. Vitousek: Well, it can change, if the Court please. [1492] That is the purpose of this question. The minute I bought it, that's my capital investment. It may be entirely different from the capital investment of the previous owner.

The Court: That's right. I think he has already explained that.

Mr. Vitousek: If it has been explained——

The Court: If that is what you are asking him, I don't think your question is directed to it. I think as stated the objection to that question is good. But I think if you reframe it you might improve the situation, although I still think it has been asked and answered on direct.

Mr. Vitousek: If the Court please, I'll with-

(Testimony of George L. Schmutz.)

draw that question at this time, and I'll go over the notes during recess.

The Court: All right. As a matter of fact, we are about scheduled by the clock for our first recess, so it might be well for you to go over your notes and we'll clear it up.

(A short recess was taken at 10:00 a.m.)

### After Recess

Mr. Vitousek: If the Court please, in connection with that question of capital investment, I find that was answered before.

Q. Mr. Schmutz, yesterday, in response to a question of cross-examination, as I understood you to say, you considered this plantation had normal management? A. I did. [1493]

Q. Now, how did that enter into your consideration?

Mr. Rathbun: I object to that as not proper redirect. That's a proper question on direct; no occasion for asking it on redirect.

Mr. Vitousek: On redirect you can ask any question brought out the first time on cross. I don't understand the Government in this case. I always understood we were trying to get out a full picture of full facts. Now every technical objection that can be raised is being raised here. But it is the proper redirect. It was brought out on cross-examination the first time about management. We are entitled to find out what he meant by his answers,

(Testimony of George L. Schmutz.)

if the Court please. We are trying to get this matter before the Court in a clear manner so the Court can rule on it, having everything in mind.

Mr. Rathbun: That's a usual reply when they haven't got any real reason to say that you should let everything in. That doesn't answer my objection. It's perfectly orderly rule of court that you can't answer questions on redirect which should have been asked on direct. And that is not technical. The courts made that technical if it is. I didn't.

The Court: On the other hand, it is true that this issue of management was brought out as a matter on cross-examination, was it not?

Mr. Rathbun: It was the reasons that he gave for his opinion in his direct examination. That's why. One of them. [1494] He considered it a successful company, a successful operation.

Mr. Vitousek: That's quite true, but nothing was said about management.

Mr. Rathbun: Well, that goes with it, doesn't it?

Mr. Vitousek: That's your argument. Don't argue with me. Talk to the Court.

Mr. Rathbun: I'm not arguing with you. I wouldn't waste my time. There's no——

The Court: Just a minute.

Mr. Rathbun: There's no occasion for his remark.

The Court: Well, he was talking to the Court, and there is no need for you to answer.

Mr. Rathbun: Well, I'm talking to the Court.

(Testimony of George L. Schmutz.)

The Court: That strikes me as correct, that in his direct examination he talked about assuming successful management.

Mr. Vitousek: It was my recollection, if the Court please, that he said that there had been a successful and reasonably profitable enterprise, but nothing was talked about management on his direct.

The Court: Well, just a moment. We'll review it. My notes show that that first issue of management arose on cross-examination, and therefore I will allow the question. You may have an exception.

A. I don't know how to answer the question, Mr. Vitousek. I assume that there was a normal management. How that influenced [1495] me, I can't say.

Q. Did you assign any dollars and cents in your valuation to that fact? A. No, I did not.

Q. Did you assign any dollar and cents figures in your valuation to the other matter we have discussed?

Mr. Rathbun: I object to that as not proper redirect, if the Court please.

The Court: Will you wait until he finishes?

Mr. Rathbun: Well, I can't tell.

The Court: Keep your voice up and restate your question.

Q. Did you assign any dollars and cents figure to the other question that was asked you, or another question that was asked you in regard to the

(Testimony of George L. Schmutz.)

expensiveness of conducting the sugar plantation here involved after the takings involved in this suit?

Mr. Rathbun: I object to that as not proper redirect examination.

The Court: Overruled.

A. No, I did not.

Mr. Vitousek: That's all, if the Court please.

The Court: Any further questions?

Recross-Examination

By Mr. Rathbun:

Q. Mr. Schmutz, as I heard your testimony, you testified [1496] in substance among the things that you considered in arriving at this opinion prior to these takes, Honolulu Plantation Company was an integrated enterprise, grew cane and made sugar, engaged in a perfected synchronization of an agricultural and industrial productive activity. Did you make that answer in substance?

Mr. Vitousek: If the Court please, we object to this as not proper recross. There is nothing on redirect that was gone into in this particular point. It was asked on direct examination and should have been the subject of cross yesterday.

Mr. Rathbun: I'm asking it now because the Court overruled my objection. It is now in on redirect.

The Court: I don't understand your last statement.

Mr. Rathbun: My last statement is that I objected to it because it was not proper redirect and

(Testimony of George L. Schmutz.)

the Court let it in, that he didn't assign any dollars and cents value to that. Now I have a right to pursue that.

The Court: I hear you but I don't relate it to your question.

Mr. Rathbun: Well, my question is going to go through all of these items and see what he did assign dollars and cents value to. The first time he said that.

The Court: You are calling to his attention this particular statement that he made on direct?

Mr. Rathbun: I'm telling the Court that's my purpose. [1497]

The Court: In other words, this is just a foundation question?

Mr. Rathbun: Well, it's very much more than foundation, if your Honor please. It goes to the fact that he testified to on redirect examination for the first time.

Mr. Vitousek: If the Court please,—

Mr. Rathbun: He assigned no dollars and cents value he said.

Mr. Vitousek: If I may be permitted to answer that this witness throughout his whole examination has never assigned a dollars and cents value on direct. When we asked him those questions he said he considered all these things. It comes right within the decisions what an expert can consider. On cross-examination there were two, perhaps three particular matters brought out, two that had not been discussed in detail on direct. One was in re-

(Testimony of George L. Schmutz.)

gard to management and the other was in regard to these increased costs, reading from this so-called claim. Now, those two items were new on cross. All the others had been discussed. They had been discussed on direct. On redirect we asked no questions of that kind except in connection with the two items. Nor is what counsel was asking was with regard to statements in this book, in this so-called Exhibit for identification. I mean counsel for the Government. He read various statements and said one of them would show a question of increased cost, if the Court please. There was a [1498] statement on that. Then he asked the witness if he considered it. I never asked any such questions on direct. And the witness answered Yes.

Now, I asked did he assign any dollars and cents value to it. That was the purpose of the question on redirect. It was the question. It was brought out on cross for the first time.

The Court: Well, this is clear, that this recross examination is limited to the matters brought out on redirect. We can all agree on that.

Mr. Vitousek: Right.

The Court: The question that Mr. Rathbun asked confuses me for the reason that it relates directly to one of the first answers this witness gave on direct examination, and that's why I am asking him if he is using it as a foundation question to get directly to the matter brought out on redirect examination. If he is, I will allow the

(Testimony of George L. Schmutz.)

question. But if it is going back into a field that should have been covered by cross-examination originally, the answer of course is no. With the understanding that this will lead up to matters brought up directly on direct examination, the question will be allowed.

Mr. Rathbun: Yes, your Honor. May I have the last question?

(The reporter read the last question.)

A. I did. [1499]

Q. Did you give any dollars and cents value in your opinion in this case to that item?

Mr. Vitousek: Now, if the Court please, we object that it is not proper recross. It was not brought up on redirect at all.

Mr. Rathbun: The last question he was asked, the answer that he gave, that no dollars and cents value—I mean, he gave something no dollars and cents value. Now, by process of elimination I am going to try to find out what he did give the dollars and cents value to. I have to eliminate that to do that.

Mr. Vitousek: Well, we go back all over on recross. I don't know—it's up to the Court to decide.

The Court: Let's stop these side remarks. They don't help at all.

Mr. Vitousek: Under counsel's statement we are going back on recross over everything that happened on direct. Now, that is not proper recross. What he can go back over is what we brought out on redirect, matters that he brought out on

(Testimony of George L. Schmutz.)

cross, which were new matters. And that's what we confine ourselves to.

Mr. Rathbun: The new matter, if your Honor please, is perfectly obvious. They have taken on direct examination—he is being presumed to have given all the reasons of his valuation and how he arrived at it. Now, I objected to that as not re-direct, but he was allowed to answer, and that is not [1500] critical at all—

The Court: Go ahead.

Mr. Rathbun: And he brought in an element of a reason for his valuation, and one of the things that he did not do was that he did not give any dollars and cents values to the item of normal management.

The Court: Right.

Mr. Rathbun: That's the first time he testified to that. Not a word on direct examination like that.

The Court: Well, you can cross-examine him on that point and the other point that was made that is similar to that, but your question here relates again to one of the very first answers he gave; and your question is now, did you give any dollars and cents value to that?

Mr. Rathbun: Yes. Now going to credibility, having answered that for the first time.

The Court: What would he mean by that, in your question?

Mr. Rathbun: Why that is the thing that he said, normal management.

(Testimony of George L. Schmutz.)

The Court: If that is your question, I will allow it.

Mr. Rathbun: Well, that is his answer to the question, your Honor. I am not limited by his answer. That gives rise to what he did give dollars and cents value to now. He never said in his direct that he gave dollars and cents value to anything. Now he is telling what he didn't give dollars and cents value to. And I am going to ask him the things that he [1501] considered. I am going to try to name them as he gave them. He detailed them in the direct examination. And I'm going to see which ones among those he did give dollars and cents value to. He never said anything about giving dollars and cents value to them in direct examination.

The Court: May I have that last question again?

(The reporter read the last question.)

The Court: If you will describe what you mean by that item, I could see the question.

Mr. Rathbun: I read what he stated. The previous question. I asked him if that is in substance what he stated.

The Court: He said he did.

Mr. Rathbun: Yes.

The Court: Well, that certainly relates to the matter brought out on direct, not on redirect.

Mr. Rathbun: Why, of course it does. That question relates to it without any question. But I am looking it up for the purpose of eliminating

(Testimony of George L. Schmutz.)

now. I have to tell him in front of him what I am up to now, by what he said in his conclusions now as to the reasons for his opinion in this case. He gave a reason that he never gave before. That got down to dollars and cents values, which he resisted pinning himself down to on direct and cross-examination, both. He said he didn't consider any one of these things separately. They were all considered together. There wasn't any dollars and cents value [1502] given, or not given, testified to, by him before.

The Court: I'm not sure I follow you, but on the understanding that you are going to tie it up with his redirect, I will allow your question.

Mr. Rathbun: Well, that's my purpose.

The Court: You may have an exception.

By Mr. Rathbun:

Q. Do you remember the question?

A. Yes. The answer is that I did not assign any dollars and cents value to that item.

Q. All right. You said that the dividends distributed to the shareholders back in '98, and specially to the year '24, was one of the things you considered, did you not?

A. Yes, I did say that.

Q. Did you give that item any dollars and cents value in forming this opinion?

A. No, I did not.

Q. You said you considered the earnings of the property in substance, did you not? A. I did.

Q. Gave that consideration, in other words?

(Testimony of George L. Schmutz.)

A. I did.

Q. Did you give any dollars and cents, did you give that item dollars and cents valuation in your opinion?

A. I did not. [1503]

Q. You took into consideration, you testified, the book value of this company, the property of this company, did you not?

A. I did.

Q. Did you give that item any dollars and cents value in arriving at your opinion?

A. I did not.

Q. You stated in your examination that you gave consideration to the history of this company and what went on before, did you not?

A. I did.

Q. Did you give that item any dollars and cents value in your opinion?

A. I did not.

Q. In 1936 the company renewed or extended most of its major leases to 1965 and in one light became a new enterprise. Did you testify to that in substance?

A. I did.

Q. And did you give any specific dollars and cents value to that item in arriving at your opinion?

A. I did not.

Q. You also stated that you took into consideration the amount of money spent by the company in additional capital improvement and betterments in three years following the new leases, did you not? [1504]

Mr. Vitousek: If the Court please, that's been asked and answered even on recross.

(Testimony of George L. Schmutz.)

Mr. Rathbun: It hasn't been answered in connection with this question.

Mr. Vitousek: May I have that question?

(The reporter read the last question.)

A. I did.

The Court: Wait a minute.

Mr. Vitousek: If the Court please, I still maintain the objection that it is not proper recross. In order to save time I'll withdraw that.

The Court: You may have a continuing exception to this line.

Q. Did you give any dollars and cents value to that item in arriving at your opinion?

A. I did not.

Q. You testified in substance that in June of 1939 there commenced a series of takings in which cane lands were lost to the United States and others, and that those losses continued up to the first of the consolidated cases here, including lands in these 13 cases. Did you testify that way on direct? In substance.

Mr. Vitousek: We submit that he should know what these 13 cases referred to.

Mr. Rathbun: He testified to that. [1505]

Mr. Vitousek: You're asking the question. Now, does he mean these 13 cases before the Court? I think we are entitled to know that.

The Court: I assume that.

Mr. Vitousek: That can't be assumed because there have been a lot of consolidated cases in this.

The Court: Oh, I think it is very apparent that

(Testimony of George L. Schmutz.)

there is only one group of 13 cases that we have ever referred to in this proceeding and these are the cases now on trial.

Mr. Rathbun: And further, I am taking his testimony; he gave that testimony.

The Court: Well, you are not quoting him verbatim?

Mr. Rathbun: In substance.

The Court: You don't know positively that he talked in terms of 13 cases, do you?

Mr. Rathbun: That's what he said.

The Court: Are you sure of it?

Mr. Rathbun: I am sure that he said 13 cases.

Mr. Driver: So am I. I wrote it down.

Mr. Rathbun: I'm sure that he did. I've got that note myself.

Mr. Vitousek: If the Court please, I would prefer, if there is any question, to take the record. I have no such recollection that he didn't consider these takings. That's what he is reading in this case. I don't believe he ever made [1506] such a statement. The whole purpose of the trial here is these 13 cases.

The Court: Just a minute. Mr. Witness, did you know what they meant in that last question by the phrase "13 cases?"

The Witness: I assumed it to be the consolidated cases at issue here now.

The Court: On the assumption that that is what is meant here now, can you answer the question? Don't answer it, but can you? Do you understand it well enough to answer?

(Testimony of George L. Schmutz.)

The Witness: Well, the question is—

The Court: I don't want you to answer it, but with that phrase are you able to answer? Do you understand the question?

The Witness: Well, the question was, did I make such a statement, as I understand it?

The Court: Read the question.

(The reporter read the question referred to.)

The Court: Do you understand the meaning of the phrase "13 cases?" Do you understand that phrase as used in that question?

The Witness: I do.

The Court: And with the understanding that that relates to these cases now on trial, can you answer the question?

The Witness: Yes, I did make such a statement in substance.

Q. Pardon me?

A. I say in substance I made such a statement.

Q. Well, that is substantially the way you stated it? A. That's right.

Q. That is true of all of them that I have asked you about, isn't it? A. I think it is.

Q. Substantially is the way you stated it, the way I gave you the question?

Mr. Vitousek: We think it is improper cross-examination. I don't know if he's been quoting him before. I think we ought to confine it to specific questions.

The Court: I didn't hear what he said.

(The reporter read the last question.)

(Testimony of George L. Schmutz.)

Mr. Vitousek: The point is there that this is a general question in all that is stated. Now, he hasn't been asking about opinions altogether. It's not tied up to anything particular. It goes to the whole testimony.

The Court: It's very apparent that in this line of questioning Mr. Rathbun has been consulting some notes and asking the witness to agree or disagree with him, whether in substance on prior testimony he testified substantially this way. I think it is clear that it relates to that. It seems to me we are losing an awful lot of time over minor details. Proceed.

Q. Now, did you give any dollars and cents valuation to that item in your opinion of value?

A. I did not. [1508]

Q. That following these takings in 1939 the company was able to make replacement of cane at higher elevation, did you testify to that in substance? A. I did.

Q. Did you give that any dollars and cents valuation in your opinion of values?

A. I did not.

Q. Now, pertaining to Exhibit 1 for identification, Government's Exhibit 1 for identification, table 1, you were asked on redirect in column 6, net income available for interest by investment, stated, you said the figures there were incorrect and then you illustrated by stating that it is shown on the reports, annual reports, that in 1943 there was transferred as to surplus one hundred ninety odd

(Testimony of George L. Schmutz.)

thousand dollars, and so on. You remember that what I am talking about? A. I do.

Q. Now, those depreciations, and so forth, the company got money value for those, did it not, through income tax deductions?

Mr. Vitousek: If the Court please, we submit that that question is not intelligible, the company got money value for those depreciations. We object to the question.

The Court: That isn't all of the question. The question is, Did not the company get money value for those depreciations through income tax deductions? [1509]

Mr. Rathbun: That's right.

Mr. Vitousek: We submit still, if the Court please, money value through income tax deductions is not very—

The Court: The witness may answer the question if he understands it.

The Witness: I don't understand it.

Q. You don't understand it? They could take losses, can't they, on income tax up to a certain point?

A. If there is a loss, the company can take a loss and show a loss.

Q. Supposing they depreciate a piece of property to two percent, and the amount amounts to a hundred thousand dollars that year, is that a deduction that they can take under their income tax?

A. Depreciation is a deduction.

Q. Yes, that's what I asked you, wasn't it?

(Testimony of George L. Schmutz.)

A. Yes, sir.

Q. All right. To that extent they get value for it, don't they, in the lesser income tax they pay?

A. Well, the greater the amount of depreciation, the greater the amount of the deduction for income tax, that is true.

Q. And by the same rate it reduces the tax, doesn't it, by the same method, to the extent of the depreciated item?

A. Yes, there is a difference there. That is true. [1510]

Q. Now, you remember what I asked you about yesterday when I called your attention to those years in which you set forth—1936, 1937, 1938—the additional invested capital, don't you?

A. I do.

Q. You also remember that I called your attention to a recapitulation of invested capital year by year, don't you?

A. I do.

Q. And I called your attention to the fact that the amounts year by year on that recapitulation of invested capital did not add up each year to the amount of those three years as you gave the additional invested capital, didn't I?

A. By that you mean that the increase in the capital over the three-year period was less than the amount of new capital put into the enterprise?

Q. The new capital that you said had been put into the enterprise.

A. That is correct.

Q. And that's what I asked you about, wasn't it, that recapped invested capital year by year?

(Testimony of George L. Schmutz.)

And I had it in front of you and showed you the item, didn't I?      A. I recall that.

Q. That's right, isn't it?

A. What is right?

Q. What I just asked you, that that's what I directed [1511] your attention to it.

A. You did direct my attention to it, yes, sir.

Q. Now, you say that you never knew of unliquidated damages for the loss of land, is that what you meant to say, stated as a claim or on books of the company, is that what you meant to say?

A. That's what I meant to say, that a claim that had been uncertain, that was unliquidated, uncertain as to the amount and the probability of collection, I have never seen any books which showed any definite amount for them for that.

Q. Suppose a company obtained some leases of some land and they fixed the value of those leases in their opinion definitely, they put it on their books, they'd put it on their books, wouldn't they?

A. They would.

Q. And when they lost it, the land, they'd take it off their books, wouldn't they?

A. I should think they would.

Q. Yes. Now, Mr. Schmutz, did you ever see these annual reports that are in evidence here that you have now been testifying about before you formulated your opinion of value in this case?

A. I did.

Q. And you examined them, did you?

A. I did. [1512]

(Testimony of George L. Schmutz.)

Q. When did you do it and where?

A. In San Francisco in 1944.

Q. Where did you get them in San Francisco?

A. The office of the Honolulu Plantation Company.

Q. You went back last night and went over some figures that had been referred to in your cross-examination and made some new computations, didn't you?      A. I did not.

Q. You did not?

Mr. Rathbun: I think that's all.

The Court: Any further questions?

Mr. Vitousek: If the Court please, just a moment. That's all, if the Court please.

The Court: The witness is excused.

(Witness excused.) [1513]

Mr. Vitousek: If the Court please, I at this time ask the Court that this matter be recessed until December 20th. We have learned definitely that Mr. Spalding will be back; he is leaving on the boat this Friday and is scheduled to be here on the 19th. Mr. Austin, whom I'd like to recall, will only take one minute. The purpose of that is to have him get in the record the paper he was talking from, from his black book, on which there seems to be a lot of variance on the ideas he read. I want to get that particular sheet in the record. The other witness we had here all day yesterday is one of the Government officials who said he had very urgent Government business today. Mr. Crozier; and we would like to have it go over to the

20th so we would have those three matters then. If the Court wants Mr. Austin, we can send for him. It will only take a minute. But I thought we could take it all up at that time.

The Court: So that you have two more witnesses, one a recall?

Mr. Vitousek: Three, one recall and two.

The Court: Two new witnesses, Mr. Crozier and—

Mr. Vitousek: And Mr. Spalding.

The Court: Well, I appreciate that perhaps one of your witnesses has important business to attend to, but I don't see why we have to wait.

Mr. Vitousek: If the Court please, we could, but they [1514] are having a great controversy over value, his successors, as to the value of certain property in the country district, and he had a hearing today and he had to attend to it.

The Court: Well, by agreement of counsel to have a recess until the 20th—

Mr. Vitousek: I mentioned that particular witness to the Government counsel yesterday, and he said he had this engagement, and I understand they said it would be satisfactory to them. I could call Mr. Austin now, but it is such a small matter.

The Court: Well, it wouldn't help us very much. Mr. Rathbun?

Mr. Rathbun: Just a moment, if your Honor please.

The Court: What is your reaction to this request that we continue?

Mr. Rathbun: It's entirely immaterial to us.

Whatever will accommodate them, I am willing to do as far as their time is concerned. I have nothing else to do but Government cases.

The Court: Mr. Spalding will be available as a witness on the 20th?

Mr. Vitousek: Yes. After our discussion in your Honor's chambers we wired him and had a cable back that he expected to leave on Friday, which will bring him here the 19th.

The Court: Well, would there be any advantage to starting a day or so ahead of the 20th and taking Mr. Crozier's testimony? [1515] How long will that take?

Mr. Vitousek: Well, I don't imagine it will take a full day. We can do that, if it's all right.

The Court: We can do that on the 19th.

Mr. Vitousek: The 19th.

The Court: How does that strike you?

Mr. Rathbun: Yes, it's all right, your Honor.

The Court: All right.

Mr. Vitousek: And have Mr. Austin then.

The Court: All right, we'll recess this case until the 19th.

Mr. Rathbun: Just a moment, your Honor. I have a motion that I want to make. He started on this before I had a chance to do it. We move now to strike the testimony of Mr. Schmutz for all of the reasons which we gave in our objection to the question when he was asked to give his opinion of value, and in addition thereto for the additional reasons that he has taken into consideration, as shown by his complete testimony now—having been

cross-examined—what the record shows without question to be a business damage, non-compensable in a condemnation suit. It shows that he has taken into consideration, in arriving at his opinion of value, improper elements under the law, such as profit, dividends paid, losses, and so forth. It appears also that he has taken into consideration a lease as being in existence, namely, the Damon lease, which we say [1516] has expired, and the record at this time shows it on its face that it has, and had before the time of these takings.

Mr. Vitousek: If the Court please, there is no such evidence in this case as stated, that this has expired. We are prepared to argue that lease as under the laws of the Territory it is in existence, not necessarily as the continuation of the old lease but a new lease from that time on of land described in the new documents, the new documents consisting of the letter of offer and the definite, unconditional acceptance, which under the laws of the Territory constitute a lease. The parties entered into possession, made improvements, it's been testified to here. Under all the authorities of the Territory that does constitute a document, constitute a definite lease. That this witness might describe it as a renewal is immaterial for the purpose of his testimony as to whether it was a renewal of an old lease or a new lease of the land for the term of ten years commencing with the expiration of the old. He is not a lawyer. The material point was that he considered this for the purpose of his testimony; he said a lease to 1953, 9-K I believe it is. And that's just what it is. It is immaterial for the

purpose of the Court whether it is an extension of an old lease or a new lease; what it is is a definite offer made by the trustees and signed by them of land comprising fields now in cane mauka of the Kamehameha highway, makai of the highway, 92 to 94, and the lease of [1517] fields 91, 107, not to be renewed, 97-A and 97-B of gore lot B, surrendered. Now, that takes out of the lease certain areas but leaves in others, and the others that are left in, as shown by the map, are involved in these takings.

That is a definite offer of rental specified, terms specified, land specified, and is an unconditional acceptance in writing back by the attorney-in-fact to the trustees of this area, the lease to commence, ten years as the term, for a period commencing January 1, 1944, terminating December 31, 1953. And that's exactly the terms shown on all these exhibits including the last one offered in evidence, if the Court please. That's Exhibit 13-T, which shows the Damon Estate, Moanalua, December 31, 1953, shown on all other exhibits in this case

Now, if the Court please, I refer the Court to—and it is to be remembered that this particular question is to be decided by local law—the question as to what, under the decisions of law in the Territory of Hawaii, is the law of the Territory of Hawaii regarding leases. I refer the Court to *Wong Kwai against Dominis*, 13 Hawaiian, 471. I am reading from the case.

“The fact that a formal lease was contemplated did not prevent the letter and the acceptance of its terms from constituting a final binding contract,

the preparing and signing of the lease being merely in execution of the contract.”

And that is our position here. While it may have been contemplated, as the letters indicate, if these terms are [1518] agreeable, a formal lease can then be drawn up, and this is a definite acceptance back showing that they are agreeable. And in this connection, if the Court please, I call the Court's attention to the fact that we did have evidence directly in the record by Mr. Austin, that after this improvements were made on these lands and they have been in possession of them. However, before the Court rules on the validity of this document, we should be entitled to have the evidence of Mr. Spalding, because under the laws, the decisions of the Court in this Territory, where an offer is made, accepted, even though it may be without the statute—it may be under the statute of frauds—if the parties enter into possession and act upon it to their detriment, then it does become a binding lease. We are entitled to show evidence not only as to the documents, which in my opinion do constitute a definite agreement, but we are also entitled to show that the parties entered into the land acting on this with full knowledge of the lessors, acting upon this offer of acceptance and made improvements and paid rent, and so on, which would certainly prevent anyone from raising the statute of frauds in bar of such lease. In other words, the evidence in that regard is not complete.

The other point, if the Court please, in the recess this morning it was definitely fixed that the witness as an expert did not say because of this

factor I make a computation and fix a dollars and cents value. No. He did just what the [1519] decisions all say an expert should do; that is, he takes into consideration various items which the courts have said a man can consider. He did, however, definitely state, both on cross and direct, that he did not consider any so-called business losses, loss of business. And it was explained yesterday, as the Court will recall, on cross-examination. He did state that he considered it profitable, as I understand it, but there was no sitting down with a pencil and capitalizing the profit to arrive at the value. He considered the items that anyone who was a prospective purchaser would have considered. He took the records of the company, as shown by its financial statements and annual reports. He took into consideration the fact that the areas for uses, cane lands, were depleted. All these matters he took into consideration. But he did not establish a dollars and cents value.

I call the Court's attention to the case of the United States against 3,969.59 acres of land. 65 Federal Supplement, 831, reading from page 838:

“Opinion testimony as to the market value may be given by expert witnesses. The opinion of such witnesses is admitted in evidence in cases where the value of property such as owned by the defendant in this case involved here is an issue. It is admissible when the witness is one who has sufficient knowledge concerning the matter, acquiring by study, training and observation or experience to permit him to give his opinion. [1520] However, where the testimony of such witness is as to any-

thing that can be observed and seen by any other witness, his testimony is to be viewed as that of any other witness, giving consideration to any particular training and experience he may have as to any bearing it may have on any increased accuracy on his part over that of a person of ordinary experience. The jury is not bound by any opinion testimony, and it should be and is to be considered by them in connection with all other evidence and should be given such weight as they believe it to be entitled to receive. In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in the sale of property between private parties. The inquiry in such cases must be, What is the property worth in the open market, viewed with not merely the reference of use to which it is at the time applied? The owner of property is entitled to just compensation for this taking, and just compensation includes all elements of value that are inherent in the property."

Now, if the Court please, in the Baetjer case and in the other case I cited to the Court, the witness is entitled to take these matters into consideration. The weight to be given to his opinion in this case is for the Court to decide, it not being a jury case. But the opinion of the expert when he arrived at the opinion, knowing all the matters involved, considering what a purchaser would consider as between private [1521] parties, is certainly entitled to be in evidence as to the value to be given to that opinion as something to be weighed by the Court, considering all the evidence before it. But

the opinion itself is before this Court and entitled to be received.

The Court: Do you wish to reply?

Mr. Rathbun: I don't think so, your Honor. On his statement he is going to offer further evidence on the lease. We may offer some ourselves when that comes forth.

The Court: Well, then, for the present purposes—

Mr. Rathbun: Pardon me?

The Court: Go ahead.

Mr. Rathbun: We are not bound by the laws of the Territory on the matter of substance. Of course, the Court knows that.

Mr. Vitousek: Well, if the Court please,—

Mr. Rathbun: As far as the evidence here is concerned, our point is on the evidence as it now stands on our motion, and there is no evidence here that I have heard that anybody went into possession, if it was material even, or that they paid any rent on it, or that there was a renewal or that they paid any rent on it. That's all we have to say.

The Court: Well, I think the best thing to do for the present purposes is to overrule the motion and give you an exception. And when the matter comes up again you can present additional arguments. So I will overrule it and give you an [1522] exception on each of the grounds stated.

Mr. Vitousek: If the Court please, the last witness wants to leave for the mainland, having other engagements, and we have no further need to recall him. I just wanted to ask the Government at this time because he proposes to go out on tonight's

plane and unless counsel have need to recall him—

Mr. Rathbun: I have no objection. I wish him a very successful and happy trip.

The Court: Very well. That witness is excused, and we now stand in this case adjourned until the 19th.

Mr. Vitousek: That's right.

The Court: On which day at nine o'clock in the morning we will entertain the case further by receiving as witnesses Mr. Crozier and Mr. Austin for a very minor point.

(The Court adjourned at 11:15 a.m.) [1523]

Honolulu, T. H., December 19, 1946

The Clerk: Civil No. 514, United States of America versus 257.654 acres of land, and Civil Nos. 521, 525, 527, 529, 532, 533, 535, 536, 540, 544, 548 and 684, for further trial.

The Court: Yes.

Mr. Vitousek: In the last hearing I stated that Mr. Spalding was due and that we'd put on Mr. Austin first, but unfortunately Mr. Spalding was late today and just got in this morning and it was necessary for Mr. Austin to see him. I have another witness here, and with the Court's permission I'd like to put the other witness on and have Mr. Austin after that.

The Court: All right.

Mr. Vitousek: Mr. Crozier.

The Court: I take it that the parties are ready to proceed.

CHARLES CAMPBELL CROZIER,

a witness in behalf of the Defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Vitousek:

Q. What is your full name?

A. Charles Campbell Crozier. [1524]

Q. And are you a resident of Hawaii?

A. I am.

Q. Born and raised in the Territory?

A. I was.

Q. What is your present occupation?

A. My present occupation is Deputy Tax Commissioner of the Territory, specifically in charge of the real and personal property assessments.

Q. You are next in position, then, to the Commissioner, the Tax Commissioner?

A. Also the Assistant Tax Commissioner and act in his absence.

Q. And how long have you held that position?

A. From May, 1932, to June of 1933 I was in what is known as the Tax Board, an investigating board of the Territory, and in July, 1933, I became a Deputy Tax Commissioner, the position I just cited.

Q. And have you served in that position since that date up to the present time? A. I have.

Q. Before you started in the tax work, what work did you do?

A. In 1914 I joined the Guardian Trust Company in its land department and was continually with the Guardian Trust Company, later taken over

(Testimony of C. C. Crozier.)

by the Bishop Trust Company, to [1525] July 1, 1929, with two years out for war, and a member of the A.E.F.; July 1, 1929, to May of 1932 I was in business, in the real estate business in the City of Honolulu.

Q. Are you a member of the Realty Board?

A. I am.

Q. Prior to becoming a Deputy Tax Commissioner, or prior to becoming associated with the Tax Department of the Territory, did you have any occasion to make appraisals or assessments of property?

A. Right from the inception of, in '14, when I joined the Guardian Trust Company, and then, as I said, they were taken over by the Bishop Trust Company in 1920 or '21; and in the land department, why my experience has been around real property in its various ramifications, leasing, selling, mortgaging, and all the matters that pertain to the general real estate business.

Q. Did you, during that early period of time, act as an appraiser?      A. I did.

Q. Now, what in general in your work, as you have described your position in the Tax Office, say particularly in connection with real property, as I understood it, what in general is your work?

A. I was somewhat drafted into the present work of real property. Up to 1927 or '28 the Territory had levied about [1526] 80 per cent of its realizations from general property, principally real and personal property, and the big values prior

(Testimony of C. C. Crozier.)

to that time were in our rural and agricultural activities. We then had an enterprise-for-profit theory of determining their tax liability, and that had broken down and the Territory, along with many other communities, found their tax structure and tax realizations in a chaotic condition. The tax investigating board was appointed by the Legislature with full authority to go into the matter of the economics of taxation for this Territory, and one other feature was the idea of doing away with this so-called enterprise-for-profit, that is capitalizing the earnings of the enterprise to arrive at its real and personal property valuation, to put the enterprises back on an ad valorem basis of taxation. And the J. G. staff of the Associates of Oakland were hired to make that survey. The outcome of it all, Mr. Fairchild, professor of Yale University, was the tax economist hired by the Territory.

In '32 we found ourselves in further economic financial distress, and at two special sessions of the Legislature they completely revamped the tax methods of the Territory, and they put all these areas that were on the so-called enterprise-for-profit, that is our sugar and pineapple ranches and other big enterprises, hotels, back on the ad valorem basis, that is, valuing the land and improvements thereon. It was a radical change in this Territory. And that's when I say I was somewhat [1527] drafted into carrying on the so-called Stafford work. Stafford made a survey of the values, starting with Fort Street and going out to the different points

(Testimony of C. C. Crozier.)

and complete islands. And the Legislature authorized the new real property law, in which all these properties would be valued on the ad valorem basis, in which case a study was made of all the plantations to arrive at a rate per acre, in cane principally, and to pick up all the improvements which had never been itemized or taxed as improvements in the Territory.

Q. Do you have charge of that work?

A. I did.

Q. And did you make a study of the various plantations in the Territory?

A. I did, along with others that were in the group, so to speak, or in the office. There was Tax Commissioner Waterhouse and the different assessors. But the principal work was done by me and the staff under me.

Q. And did or did not that require a study of the land tenure, that is, the matter in which land is held by these plantations?

A. I—it did. It took many factors. It took the land tenure; that is, the plantations' fee land; many of the lands are owned under undivided interest, the corporation owning certain fractional interest of land and individuals or other corporations or firms or trusts. Then the Territory has some [1528] valuable sugar land, and then we find a great many individuals in the states, and corporations, family holding corporations, owning these lands that were in the sugar enterprise. The study was made from a number of points. One was the sales test, that

(Testimony of C. C. Crozier.)

we could gather from different lands. But we found that very few sugar lands had sold. We could capitalize rents derived from these lands. Or you could come back to the so-called productivity theory, that is, you could take a ton of sugar to market, deduct from your ton of sugar the cost of operations, allocate the net profit to landlord and operator, capitalize the landlord's share of the profit back into capital value to arrive at the value per acre or the value of the acreage.

Q. Did that work require a study and knowledge of the improvements used on plantation properties?

A. The improvements were handled a little different. The improvements were handled by a procedure of the law that was written in, and that is, replacement less depreciation; and further, due to obsolescence or age and condition.

Q. Well, you had to know the improvements?

A. That's right. A survey was made of the type of improvement, average cost factors established to set up their replacement; their, in 1933 or '34, replacement cost factors index, and replacement due to age and condition, to find what we call a present value for tax purposes. [1529]

Q. Well, now, is it or is it not true that in the makeup of plantations, that is, its properties, that they have very similar properties?

A. Yes, there are the type of plantations that practically own its land in fee. We have a number of those. We have a number of plantations that are part fee and part leasehold, including the

(Testimony of C. C. Crozier.)

Territorial lands. And in a number of cases the plantations will lease the undivided interest not owned by them. Then we have the third type of plantation that is one hundred percent lease, or pretty near that.

Q. Now, you have also irrigated and unirrigated plantations?

A. Then you get to the further type of irrigated and unirrigated plantations.

Q. In regard to the irrigated plantations, do they or do they not have, without going into capacity, similar types of mill, machinery and other equipment?

A. They are similar insofar as the mill is concerned.

Q. And how about irrigation systems?

A. Well, the non-irrigated plantation has very little irrigation systems. You find very little non-irrigation system items, such as ditches and reservoirs and pipe lines and the like; compared to the irrigated system that is considerable; tangible items in the irrigated system.

Q. How about transportations? [1530]

A. Well, transportation is, has been from my experience, has been—has lots of history back of it. In the early days, by reason of ground conditions and topography of different plantations—no two plantations are the same in that condition—we had the days of the bullock followed by railroad transportation, followed by the vehicle, of the truck, and it's been a cycle within itself.







